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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954.

No. ~~189~~ .....

IN THE MATTER OF:

INLAND GAS CORPORATION, *Debtor.*

IN THE MATTER OF:

KENTUCKY FUEL GAS CORPORATION, *Debtor.*

IN THE MATTER OF:

AMERICAN FUEL & POWER CO., et al., *Debtor.*

PAUL E. KERN, a holder of Kentucky Fuel Gas Corporation First Mortgage Bonds,
Petitioner,

vs.

BEN WILLIAMSON, JR., as Trustee of INLAND GAS CORPORATION, et al.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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Dated: July 2, 1954.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Sixth Circuit to review the order and judgment of that Court rendered in the above cause, affirming an order of the District Court of the United States for the Eastern District of Kentucky at Lexington.

The Opinions of the Courts Below.

The opinion of the Court of Appeals for the Sixth Circuit is reported at 211 F. 2d 381 (R. 403) and is appended hereto (App., p. 1a). The District Court did not write an opinion but entered an order, dated February 12, 1953 approving the Plan. That order is included in the Record.[1]

Jurisdiction.

Jurisdiction of this Court is invoked under §1254(1) of Title 28 of the United States Code. The date of the judgment of the Court of Appeals is March 18, 1954, and it was entered on that day (R. 399). The date of the order of that Court denying rehearing of the matter is April 7, 1954 and it was entered on that day (R. 421).

Questions Presented for Review.

1. In allocating the proceeds of a subordination between two groups found entitled to "creditor status" as against the Debtor holding such proceeds, may the relative participations properly be determined by stockholdings, in violation of the normal bankruptcy principle of pari passu distribution?

2. May the Court of Appeals properly refuse consideration on the merits to a contention raised before it for the first time, because its decision on a previous appeal where the point could have been but was not urged, was not then challenged by petition for rehearing or for certiorari?

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1. As permitted by the Rules, the Record (R) consists of a certified copy of all appendices filed below and of the proceedings in the Court of Appeals. For convenience we have numbered the pages consecutively. The order appears at page 178.

Statutes Involved.

"Dividends of an equal percentum shall be declared and paid on all allowed claims, except such as have priority or are secured."

Bankruptcy Act §65a, 11 U. S. C., §105a.

"After the hearing, as provided in section 169 or section 170 of this Act, and, if a plan has been submitted to the Securities and Exchange Commission, as provided in section 172 of this Act, then after the filing of the report or notice that it will not be filed, or after the expiration of the time for its filing, whichever first occurs, the judge shall enter an order approving the plan or plans which in his opinion comply with the provisions of section 216 of this Act, and which are fair and equitable, and feasible, and shall fix a time within which the creditors and stockholders affected thereby may accept the same."

Bankruptcy Act §174, 11 U. S. C., §574.

"The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees."

Bankruptcy Act §206, 11 U. S. C., §606.

Statement of the Case.

The case arises in terms of the fairness and equity under the applicable standards of the Bankruptcy Act of

an Amended Plan of Reorganization, dated February 12, 1953 (R. 265) designed to accomplish the "integrated reorganization" of three debtors, American Fuel and Power Company (American), a holding company, and its two principal operating company subsidiaries, Inland Gas Corporation (Inland) and Kentucky Fuel Gas Corporation (Kentucky). American owns substantially all of the stock of Kentucky. The stock of Inland is held 72.6% by American, 26% by Kentucky and 1.4% by others (R. 352).

Each of the three Debtors had substantial outstanding issues of debt securities held by the public and by Columbia Gas & Electric Corporation (Columbia) which immediately prior to the equity receivership of Inland and Kentucky on December 2, 1930, controlled the System through majority stock ownership of American (R. 350).

By earlier decisions of the Court of Appeals [122 F. 2d 223 (1941); 151 F. 2d 461 (1945); 153 F. 2d 101 (1946), and 187 F. 2d 813 (1951)] Columbia's claims and interests were subordinated to the claims of all the System public creditors. As a result of that subordination, the claims of all direct creditors of Inland other than Columbia have been paid in full, and American's and Kentucky's assets[2] have been or will be allocated under the Plan to satisfaction of the claims of the public holders of their respective debt securities. However, at that point there remains in Inland a substantial fund, termed in this case Inland's "surplus assets", which but for the subordination of Columbia's claims against Inland would have been allocable to Columbia. The problem presented is the proper allocation of that fund.

We believe no useful purpose would be served by detailed history. Suffice it here to note that the business of the System was the production and sale at wholesale

2. Including as assets of American that Company's claims against Inland which are also to be paid in full.

of natural gas to industrial customers in Eastern Kentucky and Western West Virginia (R. 363). The System grew gradually from 1927 to 1929. Inland was the first component. It had a more than adequate supply of gas, mostly purchased on a "take or pay for" basis (R. 373). It had potential customers, but none was required to "take or pay for" gas from Inland. The largest potential customer was The American Rolling Mill Company (Armco) which had its own gas properties. Armco contracted to purchase its gas requirements from Inland, but reserved the right to take gas from its own properties, or from neighboring producers (R. 372). Kentucky was therefore organized, sold First Mortgage Bonds and Debentures to the public and out of the proceeds bought the Armco gas properties (R. 342, 372). The purchasers of the Kentucky securities were advised by Offering Circular (R. 158) that Kentucky and Inland jointly would supply Armco's gas requirements and would develop "large additional markets" for their mutual benefit (R. 160).

At the time of the organization of Kentucky a banking group, known in this case as "the promoters" held majority stock ownership in Inland, and 99% of the Kentucky stock. 26% of Inland's stock was held by an "outside" interest. Although it was not represented that this would be done, Kentucky with a part of the proceeds of the public sale of its securities bought out that interest, and thus acquired its present Inland stockholdings (R. 348).

American came into the picture soon after, acquiring from the promoters their stock interests in Inland and Kentucky in exchange for its own stock. A year later American sold an issue of Secured Gold Notes to the public.

The American System as conceived by the promoters was a serious potential threat to Columbia, the dominant

gas producer and distributor in the area. Columbia set out to wreck the System (R. 350). It succeeded. Its method was first to acquire all it could of the outstanding debt securities of the System companies, which were having difficulty meeting interest and sinking fund payments, and finally in 1930 to acquire from the promoters their American stock. By the end of the same year, Inland and Kentucky at Columbia's instance, consented to receivership (R. 350). In 1935 the proceedings were transferred to Bankruptcy reorganization, and American placed in trusteeship. Thus the basis of jurisdiction in the Court of first instance is §1334 of Title 28 of the United States Code.

Columbia's consent, as holder of large amounts of each issue of System company debt securities was crucial to a plan of reorganization. In 1938, Columbia indicated to the Trustee of Inland its willingness to consent to a plan for that Company, provided that all claims of all System companies and their security holders against Columbia were compromised on a basis satisfactory to it (R. 145). At the same time, Columbia indicated to the Trustee of Kentucky[3] that as principal creditor of that Company it would not consent to a reorganization (R. 148). As a result all of Kentucky's physical properties were sold under Court order to the Inland estate, and the proceeds of the sale eventually distributed to the holders of Kentucky First Mortgage Bonds (R. 353).

A plan of reorganization for Inland was thereupon worked out, based upon a compromise as demanded by Columbia, and was approved by the District Court. However, appeals were taken, and the Court of Appeals resoundingly reversed, directing that Columbia's claims "be rejected and the Columbia take nothing thereby". [122 F. 2d 223, 229 (1941)].

3. The affairs of Inland and of Kentucky have continuously been administered by a common Receiver or Trustee.

The year 1939 proved to be the economic turning point for Inland, and during the following years operations of the Inland estate became increasingly profitable (R. 352). However, during the same period there was constant and continuous litigation with Columbia in the course of which the case twice again reached the Court of Appeals [151 F. 2d 461 (1945); 153 F. 2d 101 (1946)]. The Court of Appeals limited the remedy to subordination of Columbia's claims, but found that Columbia's activities had greatly injured every public interest in the System and that its claims must therefore be subordinated to "the claims of all other creditors of every class" [151 F. 2d 461, 470].

By 1949 it became clear that Inland would have some "surplus assets". This situation had not been anticipated up to that time and was not specifically covered by Court of Appeals opinion. Columbia, therefore, claimed the fund, and a second plan providing for participation by Columbia was worked out and approved by the District Court. Again appeals were taken, with representatives of the public creditors of American and of Kentucky seeking participation in Inland's "surplus assets" through their respective Debtors' stockholdings in Inland. The Securities and Exchange Commission also participated, advocating subordination of Columbia's claims against Inland to the Inland common stock as such, which would have entitled the public holders of that stock to plan participation.

The Court of Appeals rejected both the plan and all of these contentions [187 F. 2d 813 (1951), App., p. 9a]. After reference to its previous findings that Columbia's activities had done great injury to all of the System public creditors and to the fact that "if there was not complete integration of the companies composing the American Fuel System, there was, to say the least, a coordination of

their operations and an interdependence of purpose and capital structure" (187 F. 2d 817, App., p. 14a), the Court of Appeals worked out its own solution of the surplus assets problem on a basis which no participant had had the prescience to urge—a partial ignoring of the corporate entities. The Court excluded the Inland stock as such from Plan participation, found "creditor status" as against Inland for the public holders of the American and Kentucky debt securities, and directed allocation to them of the Inland "surplus assets". However, it directed that the relative participations of the American and Kentucky public creditors in the fund should be determined by the percentage relationship between American's and Kentucky's respective holdings of the excluded Inland stock (187 F. 2d 813, 817, App., pp. 9a, 15a).

The Court of Appeals reached its 1951 decision to direct allocation in ratio to stockholdings on three stated grounds: inferences *dehors* the record then before it as to what the public investors in the System company debt securities had relied upon (App., p. 14a); the assumption that only thus could problems of distribution and priorities be avoided (App., p. 15a); and its expressed belief that it had found a solution which rendered it unnecessary to decide whether Columbia's claims against Inland were or were not required to be subordinated to the Inland stock as such (App., p. 15a).

The adverse financial impact of this decision upon the public holders of Kentucky debt securities was substantial. In fact, it can be fairly said that by its direction to allocate the surplus assets fund per stockholdings, the Court of Appeals to all intents and purposes nullified the economic benefit to the Kentucky public creditors of its simultaneous finding of "creditor status" for them

as against Inland. In amplification, let us merely cite the fact that as of December 31, 1952, the date as of which all figures in the plan are stated, *pari passu* allocation of the surplus assets would have doubled the recovery of the Kentucky First Mortgage Bondholders (Cf. R. 299).

Petitioner is a substantial holder of Kentucky First Mortgage Bonds. He is a lawyer and appeared *pro se* from time to time in the District Court, from 1948 on. However, he did not participate on the 1949 appeals and did not seek rehearing or petition for a writ of certiorari at that time.

In 1952 a new plan—the basis for that finally approved by the District Court in 1953, was filed (R. 265). Petitioner retained counsel and filed objections (R. 173), urging as his principal point that the Court of Appeals having found "creditor status" (App., p. 15a) for the public holders of Kentucky and American debt securities as against Inland's surplus assets, fairness and equity and controlling precedent required allocation of those assets *pari passu* per the normal bankruptcy principle of distribution among creditors; that the Inland stock having been found worthless as a basis for plan participation was by inexorable logic equally worthless as collateral.

The District Court overruled Petitioner's objections after an advisory report from the Securities and Exchange Commission (R. 341 *et seq.*), in which the Commission observed

> "As to those objections which urge an allocation of securities on a basis different from the 72.6%-26% division directed by the Court of Appeals * * * While the Court of Appeals may reconsider the question * * * we feel that this Court must follow what is now for it the law of the case." (R. 378.)

The Plan as approved by the District Court specifically excluded the Inland stock, on the basis that the value of Inland's assets, as found by that Court, was less than the aggregate face amount of unsubordinated creditors' claims (R. 289). However, it allocated Inland's "surplus assets" per stockholdings (R. 289, 291).

Petitioner appealed, and the Trustee of Inland and Kentucky joined with him in urging the Court of Appeals to reconsider and direct *pari passu* allocation of the surplus assets fund.

The Court of Appeals, however, refused consideration of the contention on the merits saying:

> "It is to be observed that our decision in 187 F. 2d 813 was not in anywise challenged by a petition for rehearing or one for certiorari to the Supreme Court of the United States. We give no consideration, therefore, to the appeals of Kern and the Vanston committee[4] insofar as they urge the surplus assets of Inland be considered as those of a single economic entity to be allocated *pari passu* to creditors of American and Kentucky." (211 F. 2d 383, R. 405, App., p. 4a).

Petitioner applied to the Court of Appeals for rehearing and, that application having been denied on April 7, 1954 (R. 421), filed this Petition for Writ of Certiorari.

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4. The Vanston committee, which until the Inland First Mortgage Bonds were paid had represented both that issue and Kentucky First Mortgage Bondholders, did not in fact take any such position. As noted above, it was the Trustee of Inland and Kentucky who did so.

Reasons Relied on for Allowance of the Writ.

1. The decision below decided important questions of federal law which have not been but should be settled by this Court, and determined a question involving distribution among creditors in bankruptcy in a manner conflicting with controlling decisions of this Court.

As noted above, the history of this case from 1930 to 1951 is that of a twenty-year struggle between the public creditors of the three principal components of the American Fuel System on the one hand and Columbia on the other. Here under the guiding precedent of *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307 (1939), the Court of Appeals followed a long but straight course to the final and complete subordination of the Columbia claims to those of all other System creditors.

During that period of struggle, other phases of the case, most importantly the inter-relationships between the System companies and their securities structures, had little financial significance and were understandably neglected.[5]

In 1951 the Court of Appeals faced for the first time an unanticipated problem—what should be done with an overflow remaining after the primary beneficiaries of a previously decreed subordination (all holders of direct claims against Inland, other than Columbia) had been paid in full. The plan before the Court again provided for participation by Columbia, as if its claims had been subordinated only to those of other Inland direct creditors. The Court of Appeals by its earlier decisions had never intended any such result, and it so stated in 1951 (App., p. 13a). What was to follow? Was the Inland common stock the next security

5. Although the case reached this Court on the question of whether the Inland First Mortgage Bondholders were entitled to prove claim for interest on interest, *Vanston Committee* v. *Green*, 329 U. S. 156 (1946).

in line, or did justice and equity require that prior consideration be given to the unpaid claims of public creditors of the other System companies?

Here the Court entered an uncharted sea. There is no decision of this Court, nor indeed of any court, with which we are familiar—which deals with the problem of allocation of the benefits of a subordination where more than a single class is entitled to those benefits. Nor has any court or administrative agency yet had to face the problem of how to subordinate to the interests of a common stock. The Court of Appeals, entirely correctly as we see it, avoided the latter problem by a partial ignoring of the corporate entities, finding the public creditors of American and of Kentucky entitled to "creditor status" in Inland's reorganization. However, the Court apparently felt that if it phrased its determination in the language of "ignoring corporate entities" it would be faced with the necessity of determining that all assets and all claims against the assets of the three companies automatically became fungible.[6] In a bankruptcy context, whether or not this is the law is an important federal question which has never been specifically passed upon by this Court, although decisions such as *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U. S. 215 (1941) imply that it is not the law. The Court of Appeals in 1951 sought to avoid this question also, but in so doing, as we see it, fell into error in two aspects—one legal, one factual.

On the factual side, the Court of Appeals—following the technique by which courts have classically determined the ranking and priority of claims once corporate entities are wholly or partially ignored—sought to determine what had been the "reasonable expectations of the creditors and

6. Cf., the Court's reference in its 1954 opinion to "a backtracking to subject the total Inland assets to the same process" (App., p. 4a).

security holders".[7] However, it made that determination upon basic inferences *dehors* the record then before it. (App., pp. 14a-15a.)

On the legal side, the Court of Appeals did not stop to weigh its decision—which it again affirmed in 1954 by the judgment with respect to which certiorari is here sought, against the decisions of this Court in *Moore* v. *Bay*, 284 U. S. 4 (1931) and *Prudence Realization Corp.* v. *Geist*, 316 U. S. 89 (1942).

The *Moore* case, quoting the Bankruptcy Act, Section 65(a), 11 U. S. C., Section 105(a), states the rule, "Dividends of an equal percentum on all allowed claims except such as have priority or are secured." (284 U. S. 4, 5.)

By no stretch of the imagination can it be said that either the public creditors of American or of Kentucky are entitled to be treated as secured creditors of Inland. Whether or not they hold security as against their own respective Debtors is immaterial in this context.

The meaning of the phrase "have priority" in *Moore* v. *Bay* is illustrated by the *Geist* case. There this Court reversed the Court of Appeals for the Second Circuit, which had decreed subordination of a particular class of claims in a reorganization proceeding under what it conceived to be the applicable New York law. As to Bankruptcy law, there was no disagreement between this Court and the Court of Appeals, which succinctly stated [Judge Clark, 122 F. 2d 503, 505 (1941)]:

> "The only departures made from the ordinary rule of equality are based on some very definite

7. The quotation is from the latest leading Law Review discussion of the basis for and consequences of ignoring corporate entities, by Professor A. A. Berle, "The Theory of Enterprise Entity", 47 Columbia Law Review 343, 354 (1947).

> equity, such as fraud, *Pepper* v. *Litton,* 308 U. S. 295, 60 S. Ct. 238, 84 L. Ed. 281, mismanagement of the debtor by a parent corporation, *Taylor* v. *Standard Gas & Electric Co.,* 306 U. S. 307, 59 S. Ct. 543, 83 L. Ed. 669, or concealment of a claim to the prejudice of another creditor, *In re Bowman Hardware & Electric Co.,* 7 Cir., 67 F. 2d 792. In the absence of such an equity, subordination is not a function of the bankruptcy court. *Crowder* v. *Allen-West Commission Co.,* 8 Cir., 213 F. 177, 184; *Sampsell* v. *Imperial Paper & Color Corp., supra;* cf. *Moise* v. *Scheibel,* 8 Cir., 245 F. 546."

As between Columbia and the three Debtors, the "very definite equity" arising from Columbia's inequitable conduct required the subordination of Columbia's senior claims.

As between the public holders of Inland stock and the public holders of American and Kentucky debt securities, the claims of the former were properly subordinated because of the "very definite equity" that they are stockholders and the latter creditors.

But as between the respective public creditors of Kentucky and of American the situation is quite different. There has been no allegation or hint of any inequitable conduct by Kentucky. There is the record of "a coordination of • • • operations and an interdependence of purpose and capital structure" as between the System companies which led the Court of Appeals to find that under a plan of reorganization which "rests upon the assets of Inland • • • whatever the formal arrangements may have been a realistic view is that they [the public creditors of Kentucky and American] are entitled to creditor status • • • " (App., p. 16a).

Once "creditor status" was so found, *Moore* v. *Bay, supra,* clearly controls the legal consequence, absent some "very definite equity". Since worthless collateral (the excluded Inland stock of which American happens to have the larger holding) cannot give rise to any equity at all, the result below is in clear conflict with the *Moore* and *Geist* decisions.

We respectfully urge that this Court speak out clearly in this important area; that it make clear that subordination and ignoring corporate entities are flexible, not rigid concepts; that if stock of a debtor is excluded from plan participation, that exclusion, based upon insolvency, imports no value in the stock and renders it worthless as collateral; that a creditor must be treated as such and not as a stockholder; that a plan of reorganization cannot discriminate between two groups of unsecured creditors or "quasi-creditors" (App., p. 15a) of the same debtor without clear equitable basis for discrimination; that only thus can the applicable standards of the Bankruptcy Act be satisfied.

2. The decision below is in conflict with the decisions of this Court in United States v. U. S. Smelting Co., 339 U. S. 186 (1950), and Comstock v. Group of Institutional Investors, 335 U. S. 211 (1948), and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

As noted above, in 1951 the Court of Appeals gave its direction for the disposition of Inland's surplus assets under a plan of reorganization and remanded the case to the District Court for appropriate further proceedings, in effect on its own motion. The finding of "creditor status" which the Court made in that opinion based upon its determination partially to ignore corporate entities, was a radically different approach to the entire problem

from that which the District Court and all participants on the 1949 appeals had advocated. Perhaps timely application for rehearing would have been granted by the Court of Appeals in 1951. However, laying aside the question of whether Petitioner, not having been a party to the 1949 appeals, could make that application, none was made, nor was petition filed for certiorari.

The point is that in 1954 the Court of Appeals refused consideration on the merits to a contention never previously briefed or argued before it, on the technical ground that that contention might have been brought before it on rehearing three years earlier. We submit that that refusal was in effect a denial of the right to be heard, and thus of procedural due process.

In *United States* v. *U. S. Smelting Co.*, 339 U. S. 186 (1950) it was contended that a District (statutory) Court judgment should be affirmed because there had been no appeal from an earlier judgment and mandate of similar effect by which the case was sent back to the Interstate Commerce Commission; that thus the earlier decision became "the law of the case" for all purposes. Mr. Justice Minton, writing for this Court rejected this contention thus:

> "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter. *Messenger* v. *Anderson*, 225 U. S. 436, 444; *Insurance Group* v. *Denver & R. G. W. R. Co.*, 329 U. S. 607, 612. It is not applicable here because when the case was first remanded, nothing was finally decided. The whole proceeding thereafter was *in fieri*. The Commission had a right on reconsideration to make a new record. *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 374-75. When

finally decided, all questions were still open and could be presented. The fact that an appeal could have been taken from the first order of the District Court was not because it was a final adjudication but because a temporary injunction had been granted in order to maintain the status quo. This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable. 28 U. S. C. §1253. The appellants might have appealed, but they were not bound to. We think that it requires a final judgment to sustain the application of the rule of the law of the case just as it does for the kindred rule of *res judicata*. Compare *United States* v. *Wallace Co.*, 336 U. S. 793, 800-801. And although the latter is a uniform rule, the 'law of the case' is only a discretionary rule of practice. It is not controlling here. See *Southern R. Co.* v. *Clift*, 260 U. S. 316, 319." (339 U. S. 186, 198-199).

The situation here is directly analogous to that in the *U. S. Smelting* case. The decision of the Court of Appeals in 187 F. 2d 813, like all its previous decisions, remanded the case to the District Court for further proceedings. Thus it was purely interlocutory. No rule of *res judicata* could conceivably be applicable, and as we see it the *U. S. Smelting* case is clear authority that it was not necessary to preserve Petitioner's right to be heard later on the merits that he should then apply for rehearing or seek certiorari.

The Court of Appeals' refusal of access to its judicial ear upon the specific ground it stated (App., p. 4a), despite its own statement (187 F. 2d 813, 817; App., p. 14a) that inferences basic to its 1951 directive had been made without benefit of record, smacks of the application of some

sort of laches doctrine against Petitioner. So interpreted, the decision below conflicts directly with this Court's decision in *Comstock* v. *Group of Institutional Investors,* 335 U. S. 211 (1948) where it refused to apply the laches doctrine against an individual security holder in a reorganization proceeding because the question "goes beyond the objector's individual interests and affects the fairness and equity of the plan." (335 U. S. 211, 226-227, by Mr. Justice Jackson).

Mr. Justice Murphy who, though dissenting, concurred with the majority on this point, said:

> "Nor is it decisive under these circumstances that the objection might have been raised earlier by Comstock or some other bondholder. It is enough that the matter was presented in an appropriate fashion at a time when the Court was compelled to pass judgment upon the reorganization plan and at a time when no prejudicial change in the position of other parties had yet occurred." (335 U. S. 211, 235-236).

If the decision below be allowed to stand, it will in effect set up a rule requiring every creditor in a reorganization proceeding to apply for a rehearing or for a writ of certiorari after each interlocutory determination by the Court of Appeals, and the principle that rehearing should be sought only in extraordinary situations such as those involving new facts or gross error, and certiorari sought only in important cases, would be scrapped.

Thus, in its procedural aspect, at a minimum this case calls for the granting of the writ and a direction to the Court of Appeals to consider on the merits Petitioner's contention for *pari passu* allocation.

CONCLUSION.

Upon the grounds and for the reasons stated, a writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be issued.

Respectfully submitted,

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July 2, 1954.

APPENDIX.

Opinion of March 18, 1954.

Nos. 11905-11908

United States Court of Appeals

FOR THE SIXTH CIRCUIT

APPEALS from the District Court of the United States for the Eastern District of Kentucky.

In the Matter

of

INLAND GAS CORPORATION, KENTUCKY FUEL GAS CORPORATION, AMERICAN FUEL & POWER COMPANY,

Debtors.

Decided March 18, 1954.

Before SIMONS, Chief Judge; MARTIN and MILLER, Circuit Judges.

SIMONS, Chief Judge. The history of this long drawn out reorganization is sufficiently disclosed, for present purposes, in *Columbia Gas & Electric Corporation* v. *United States,* 151 F. (2d) 461, rehearing and modification denied, 153 F. (2d) 101 certiorari denied, 329 U. S. 737, and *In Re Inland Gas Corporation,* 187 F. (2d) 813. A final plan of reorganization has now, after much study and amendment, been approved by the district court in

its order of February 12, 1953. Its salient features provide for a reorganized corporation to be known as the Inland Gas Corporation. It will take over the subsidiaries of American Fuel and the assets of Inland, debtor. Claims against Inland will be paid in cash or assumed by the new corporation. The trustees of American Fuel and Kentucky, for their bond and note holders, will receive stock. The new corporation's capital stock will be placed in escrow to assure delivery thereof in the event of sale.

In our decision *In Re Inland Corporation,* supra, we directed the District Judge to subordinate the claims of Columbia Gas, because of its inequitable conduct, to those of the holders of Kentucky and American Fuel obligations. There was then a surplus in the assets of Inland over and above its debts and, since the security issues of American and Kentucky were based largely upon their holdings of Inland stock, we concluded that their holders were, in a realistic sense, creditors or quasi-creditors of Inland. We directed the residue of Inland assets to be assigned to American and Kentucky, according to their respective stock interests in Inland, which was 72.6% for American and 26% for Kentucky. Having perceived a creditor status for the holders of securities supported by Inland stock, we were unable to make any provision for a minor interest of 1.4% of the common stock of Inland held by private investors because they were in no sense creditors.

At the time of this direction, it seemed clear to all of the parties in interest that even with the subordination of Columbia's claims to those of all secured creditors, there would not be enough to satisfy the secured claims. It now appears that by reason of the successful operation by the trustee of Inland its surplus assets will be substantially greater than was at first supposed. It also

appears that American has substantial free assets derived from the payment of Inland's debts to it and the fair value of its solely owned subsidiaries which are to be transferred to the new corporation. There will, therefore, be "overage" to American beyond what is needed to discharge its secured obligations. The plan provides that American's free assets be first applied to their payment and only so much of the 76% of Inland's surplus shall be allocated to American as is needed to complete payment. The balance remaining is to be assigned to the payment of Kentucky's secured obligations. This will give Kentucky something more than 26% of Inland's surplus but will still fall far short of liquidating Kentucky's securities.

Of the objections raised to the fairness of the plan, and overruled below, four are here presented in various related and overlapping appeals. Paul E. Kern is a bondholder of Kentucky (see *In Re Inland Gas Corporation,* 187 F. (2d) 813). He contends that the plan's provision for the distribution of Inland's surplus, based upon holdings of Inland stock by American and Kentucky, is unfair and urges that distribution should be made to the public creditors of these corporations according to the face amount of their claims. The Vanston committee which represents Kentucky bondholders takes the same position. Harbison, trustee of American, contends that American's share of Inland's surplus assets should first be applied to the payment of American's notes and that such of its free assets as are not required to pay the balance should be assigned to and become part of American's estate. The Green committee represents American's bond and note holders and contends that the valuation under the plan for Inland's properties is excessive, that the allocations based thereon are unfair to

American note holders, and urges a revaluation of Inland's assets. Both Kern and the Vanston committee argue that, to the extent that American note holders are compensated in stock rather than in cash, a "step up" of 10% on the face amount of their claims is excessive. Objections are also made by various appellants, with respect to other "step ups," to the allocation of reorganization expenses and the failure of the escrow provision to provide for distribution in accordance with a future valuation rather than the valuation arrived at by the court. The SEC supports the plan as approved.

We shall not undertake to review again issues that have already been decided. In recognizing the security holders of American and Kentucky as quasi-creditors of Inland and assigning Inland's surplus to them in proportion to their stockholdings of Inland, we gave careful consideration to the interrelationship of the three corporations, reviewed their history and the details of their capital structure. We recognized them as independent corporate entities, even though certain fiduciary obligations flowed from their common control, *In Re Inland Gas Corporation*, 208 F. (2d) 13. It is to be observed that our decision in 187 F. (2d) 813 was not in anywise challenged by a petition for rehearing or one for certiorari to the Supreme Court of the United States. We give no consideration, therefore, to the appeals of Kern and the Vanston committee insofar as they urge that the surplus assets of Inland be considered as those of a single economic entity to be allocated *pari passu* to creditors of American and Kentucky. This would ignore the separate identity of the two corporations and logically suggest a backtracking to subject the total Inland assets to the same process. This no one advocates and in view of the payments already made of Inland's debts may not

be accomplished. If the argument that the American Fuel System constitutes a single economic entity has merit, it includes Inland.

Harbison, as trustee of American, felt obligated to appeal from the order approving the plan solely because of the allocation to the secured creditors of Kentucky of more than 26% of the residual assets of Inland. He contends that the full 72% thereof should first be assigned to the payment of American's obligations and only so much of American's free assets as would then be required for their liquidation. This would result in making the free assets of American available to other creditors and to its stockholders. The only other creditor of American Fuel is Columbia which owns approximately $60,000 worth of convertible gold notes and has a *general* claim of approximately $300,000. If what he suggests is done, the claims of Columbia will have substantial value and there will be equity left for the stockholders of American. In view of the fact that the stockholders were not represented below, he feels it his duty to prosecute an appeal and to present his view of the proper construction of our mandate, in order that the claims of all interested parties would be called to our attention.

Read in the light of our discussion in the several opinions cited, we think there is no ambiguity in the mandate of *In Re Inland Gas Corporation,* supra. As we said at page 817: "Since this creditor status may practically be recognized only through the medium of Inland stock owned by American and Kentucky . . ., the court is directed to amend the plan of reorganization to subordinate Columbia claims to the stock of Inland and assign the residue of Inland assets over its debts, exclusive of Columbia's claims to the account of their public creditors according to the respective stock interests of 72.6% for American

and 26% for Kentucky." And on page 820 "Columbia's claims against American Fuel and Kentucky Fuel will remain subordinated to the claims of their other creditors." It is plain that the respective holdings of Inland stock by the two corporations was used as a measuring device to apportion the several interests of the public security holders of each in the surplus assets of Inland. Precise enough at the time, it became imprecise only by reason of the wholly unexpected increase in Inland's surplus. The over-all concept, however, is clear. Columbia claims were subordinated to the secured claims against both American and Kentucky. Insofar as the percentage assigned to American is not now needed for complete liquidation of American's secured obligations, it is now available to Kentucky bondholders. True, the subrogation of Columbia claims was compelled by the injury done to both creditors and stockholders, but manifestly in the order of their priority. It would be not only an anomaly but would fly in the face of the rationale of all prior adjudications to permit Columbia, directly or indirectly, to receive any portion of Inland's surplus while the secured creditors of Kentucky were still, to large extent, unpaid. Harbison suggests that Columbia's claim will have substantial value, if his suggestion is followed. Not only that, but there will be equity left for the stockholders of American Fuel. We noted in *Columbia Gas & Electric Corporation* v. *United States,* supra, that Columbia had purchased 76% of the common stock of American. In that case, we subordinated Columbia claims to the claims of all other creditors of every class. In our later decision, 187 F. (2d) 813, we subordinated Columbia claims to the stock of Inland only as a measuring device for the account of the public creditors of American and Kentucky. We did not subordinate Columbia stock to the remaining stock

of American Fuel. We are not concerned with Columbia's claims either as creditor or stockholder, unless the debts of American and Kentucky are fully paid. We perceive no unfairness in assigning the overage of American's assets to Kentucky's security holders who are equitably beneficiaries of Columbia's subordination.

We reject the contention that the valuation of the reorganized corporation is neither fair nor appropriate under applicable reorganization standards. It was based on substantial persuasive evidence produced by unprejudiced experts. Precise, it cannot and may not be. There is no assurance that a new valuation may be more exact, in view of the difficulty in estimating unseen deposits in gas acreage. We are unable to perceive error in the court's finding as to value. A "step up" in allocations, where they are to be made in stock rather than cash, is a conventional device for equalizing distributions where senior security holders are to surrender their priority, *Consolidated Rock Products Company* v. *DuBois,* 312 U. S. 510, 529. There was no unfairness in our view in the provision that the $300,000 of estimated reorganization expenses of American should be paid out of the overage to American before assigning the residue to Kentucky's public creditors. Neither was there anything inappropriate or unfair in the escrow provision. A plan fixing participation of creditors as of one date but providing for a sale of all of the properties at another date does not unjustly discriminate against Kentucky security holders. Kentucky creditors might be deprived of additional funds if the sale should be in excess of the reorganized company's reorganization value. On the other hand, Kentucky security holders are protected if the sale should be at less than that value.

The plan as approved by the District Court appears to be fair and feasible. The District Judge has diligently and with great wisdom supervised the reorganization and the development of the plan. Surely, after nearly twenty-five years, there should be an end to this long drawn out litigation, with its delay to security holders and the mounting expense of administration and litigation. Of course, finality is not an end in itself if there be manifest unfairness to any party in interest. None has been demonstrated. The order of the District Court approving the plan is, therefore, in all respects,

Affirmed.

EXCERPT FROM

In re Inland Gas Corp. et al.

(five cases)

Nos. 11090-11094.

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

March 19, 1951

SIMONS, Circuit Judge.

There are here involved five appeals from an order of the district court approving a plan of reorganization for the debtors in proceedings under Chapter X of the Bankruptcy Act, 11 U.S.C.A. § 501 et seq. The appeals overlap. Both appellants and appellees variously challenge and defend findings of fact, conclusions of law and the provisions of the order in multiple aspects. The most important contentions which lie at the root of the whole controversy, however, are in respect to the status that is to be accorded the claims of the Columbia Gas System, Inc., successor to Columbia Gas & Electric Corp., in the distribution of the assets of the debtors, and this leads to a consideration of our previous opinions in In re American Fuel & Power Co., 6 Cir., 122 F.2d 223, and Columbia Gas & Electric Co. v. U. S., 6 Cir., 151 F.2d 461, and particularly of our mandate in the second of these cases.

The Columbia Claims

When the controversy first claimed our attention in 1941 it was upon an appeal by creditors of the American Fuel & Power Company, seeking to set aside an order approving a settlement between the trustees of the debtors and the Columbia System. In an exhaustive opinion we held that Columbia had acquired its securities and stock in pur-

suance of an illegal and inequitable scheme to destroy competition with it by the American Fuel & Power Company and its affiliates, that under the facts of record no principle of equity, morals or law required the court to lend its aid to further a scheme abhorrent to all recognized rules of right and justice. The orders of the court were reversed and the causes remanded with direction that all claims or stock interests of Columbia against the debtors be rejected.

Columbia, not having been a party to the proceedings in that case and so not bound by it, the district court conducted extended hearings upon the Columbia claims, and applying the law as we found it to be, entered orders upon detailed findings of fact and conclusions of law rejecting them all. Again there were appeals mainly by Columbia, challenging the judgment. After careful consideration of the findings and conclusions of the court, and an extended six volume record, we accepted the findings of the district judge but limited the remedy to the subordination of Columbia claims to the "claims of all other creditors in every class." Petitions for amendment and clarification of our mandate were later denied. 6 Cir., 153 F.2d 101.

When our decision was rendered on November 26, 1945 in Columbia Gas & Electric Corp. v. United States, supra, the Supreme Court had but recently decided the case of Hartford-Empire Co. v. United States (Jan. 8, 1945), 323 U.S. 386, 65 S.Ct. 373, 89 L.Ed. 322, wherein the court denied relief for infringement of patents illegally used against those infringing during such illegal use, but declined to hold the patents invalid. We thought that under the facts of that case there might well remain to the appellants property rights which, when their owners had abandoned their illegal practices and been purged of inequity, could still be enforced against subsequent infrin-

gers, and that it was for that reason the court would not permit them to be forfeited. We perceived an analogy between the patent rights there preserved and the claims of Columbia here involved, and so while we approved the findings of the district court that the conduct of Columbia in acquiring its securities was inequitable and illegal, we concluded that subordination of its claims to those of other creditors was a more appropriate remedy than their complete rejection. We were probably led to this also by the view of the SEC that upon the facts of the case then developed, the distinction between subordination and rejection was purely academic. Mature consideration leads to the conclusion that the analogy between Columbia securities here and the patents involved in the Hartford-Empire case, supra, is not as close as it then appeared to us to be. The Supreme Court found no evidence that the patents there involved had been illegally or fraudulently obtained. It was their inequitable use that led to the adjudication and there still remained the possibility that when such inequitable use was discontinued and their owners purged of inequity a legitimate property right against subsequent infringers might thereafter be maintained. Here the securities of Columbia were tainted with inequity from the very beginning, and no reasonable expectation may be indulged that in the present status of the debtors there may come a time when Columbia may assert any right in such securities as against creditors who have not been injured by its illegal and inequitable conduct. This is not to say that subordination is not a more appropriate remedy than rejection, in view of the principle applied in the Hartford-Empire case, if by it a just result may be reached. Nor are we precluded by our previous mandate, even if susceptible to the interpretation put upon it by the district court, from considering whether the plan of reorganiza-

tion, now for the first time presented, is, in the light of all circumstances brought forth, fair and equitable, since the allowance of claims in bankruptcy remains interlocutory until the estate has been closed, New York N. H. & H. R. Co. v. Reconstruction Finance Corp., 2 Cir., 180 F.2d 241, 243, and no application of the principle of "the law of the case" need deter us from so doing, in an exceptional case, which this is, Reynolds Spring Co. v. L. A. Young Industries, 6 Cir., 101 F.2d 257, 259 however such principle may circumscribe the action of a district court.

When the plan of reorganization was submitted to the court below various parties in interest, and particularly those acting for certain secured creditors of American Fuel and Kentucky Fuel, namely, the Green Committee and the Vanston Committee, urged the court to subordinate the claims of Columbia to such securities as were in the hands of the public. This leads to the interpretation put upon our amended mandate by the court, and requires consideration of the origin and status of the securities, the priority of which is here so strongly asserted.

The Inland Gas Corporation was organized in 1927 for the purpose of producing and selling natural gas to industrial consumers. In 1928 Kentucky Fuel Gas Corporation was promoted by the same persons, financed by the same group of bankers and each issued securities to the public. The promoters also in July, 1928, organized American Fuel & Power Company for the purpose of taking over and holding stock of both Inland and Kentucky Fuel and other operating companies in order to integrate and expand their operations through unified control and management. The stockholders of Inland and Kentucky Fuel exchanged their stock share for share for stock in the holding company, and in July, 1929, American Fuel issued and sold to the public convertible gold notes, the proceeds

of which were used to provide financial aid to the operating companies and to acquire additional gas acreage and transmission lines. These securities, were guaranteed by the pledge of Inland stock held by American and Kentucky Fuel. It is the status of the securities so safeguarded that is now put in issue by the conflicting interpretations of our mandate in Columbia Gas & Electric Corp. v. United States, supra. The district judge, relying upon the definition of the words "claims," "creditors" and "debts" in Article II, Chapter X of the Bankruptcy Act, construed our mandate to provide for subordination of Columbia claims only to the claims of creditors of each corporation and so could not be subordinated to the stock of Inland pledged by Kentucky Fuel and American Fuel. He therefore rejected the contentions of the Green and Vanston Committees. He felt that he was precluded from ignoring the separate identities of the three allied corporations, and interpreted our mandate which read "The decree will be limited in remedy to the subordination of the Columbia claims to the claims of all other creditors of every class," as though it read that "Columbia's claims be subordinated as to each corporation to all other claims against such corporation."

It now seems clear that there was ambiguity in our direction to the district court. Columbia interpreted it when it applied to the Supreme Court for certiorari, 329 U. S. 737, 67 S.Ct. 48, 91 L.Ed. 636, as the protective committees now interpret it, but it here takes an opposite view and agrees with the court. The SEC, in its memorandum on a petition for rehearing, believed that clarification was unnecessary in that the decree would necessarily have to be construed to require the subordination of all of Columbia's claims against the System to those of all other creditors of the System. Difficult as it is for a court to recall

subjectively what was in its mind after a lapse of six years, it may, however, after an objective consideration of its recorded reasoning, arrive at some conclusions, even though we may now frankly concede, in view of the impact of the mandate upon the minds of those who were interested in its execution, it lacked the precision and definiteness that should have been expected.

Reading the direction for decree in the light of the discussion contained in the opinion, and as objectively as we may, it is apparent that what was being considered was the injury done to both creditors and stockholders of closely related corporations. As the full picture is now disclosed, it seems reasonably clear that if there was not complete integration of the companies composing the American Fuel System, there was, to say the least, a coordination of their operations and an interdependence of purpose and capital structure.

We are not advised by this record of the circumstances under which or the representations by which the gold notes of American Fuel supported by the pledge of Inland stock, were sold, and the trust indenture under the terms of which they were issued is not here. The inference is inescapable, however, that the main reliance of the public investors in such securities must have been the Inland stock, based upon Inland assets and pledged for their benefit by American and Kentucky. We are aware that some of the appellants contend that at that time Inland stock had little or no value. The fact remains, however, that the investors must have relied, to large extent, upon the assets of Inland. If not, why was Inland stock pledged? The purpose of the issue was to rehabilitate Inland, to save it from debt default and to increase its holdings of gas acreage, and the inference is likewise inescapable that

this must have been understood by the investors. Moreover, it now appears that through excellent management by its trustee Inland assets are sufficient to pay all of its debts exclusive of the claim of Columbia, so that the expectation of its rehabilitation was not wholly vain. Besides, the entire reorganization structure now planned rests upon the assets of Inland. So viewing it, we think that the public security holders whose investments were guaranteed and supported by a pledge of Inland stock are, in a very true sense, creditors or quasi-creditors of Inland, and that whatever the formal arrangement may have been a realistic view is that they are entitled to creditor status in the plan of reorganization. Certainly a court of equity, particularly in a bankruptcy reorganization, has the power and likewise the duty to look through form to substance. Since this creditor status may practically be recognized only through the medium of Inland stock owned by American and Kentucky without raising problems of distribution and priorities, the court is directed to amend the plan of reorganization to subordinate Columbia claims to the stock of Inland and assign the residue of Inland assets over its debts, exclusive of Columbia's claims, to the account of their public creditors according to the respective stock interests of 72.6% for American and 26% for Kentucky. Whether this means that we have subordinated securities to stock or have subordinated them to debts, measured by the respective pledges of stock, seems to us immaterial for the result will be the same. Having perceived a creditor status for the holders of securities supported by Inland stock, we are unable to make any provision for the minor interest of 1.4% of the common stock of Inland directly held by public investors, as recommended by the SEC. The holders of such stock were in no sense creditors.

* * * * *

Judgment of the United States Court of Appeals for the Sixth Circuit.

JUDGMENT

(Filed: March 18, 1954)

Appeal from the District Court of the United States for the Eastern District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby affirmed.

Order Denying Rehearing.

(Filed: April 7, 1954)

Upon consideration of a petition by Paul E. Kern, one of the appellants in the above-entitled cause, for a rehearing, and upon the prayer of the said appellant that such rehearing be before the court *en banc* and that after such rehearing the court consider and determine the issue upon its merits, and such petition having been submitted to all of the members of the court with the exception of Judge Martin, who is ill in Memphis, Tennessee,

The petition for rehearing by the court *en banc* was considered by the judges present and was unanimously denied and upon its consideration by a majority of the judges who participated in the original hearing was also denied.

FILED
AUG 2 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1954

No. 189

PAUL E. KERN, a holder of Kentucky Fuel Gas Corporation First Mortgage Bonds,

Petitioner,

—vs.—

BEN WILLIAMSON, JR., as Trustee of INLAND GAS CORPORATION, *et al.*,

Respondents.

IN OPPOSITION ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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July 30, 1954

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—vs.—

BEN WILLIAMSON, JR., as Trustee of INLAND GAS CORPORATION, *et al.*,

Respondents.

No. 189

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The order and judgment of the United States Court of Appeals for the Sixth Circuit, of which review is sought by the petitioner Kern, were based upon that Court's opinion (211 F. 2d 381); Petition App. pps. 1A-8A inclusive by which concurrent findings of fact were made by the Court of Appeals.

The opinion below points out that "after nearly 25 years, there should be an end to this long, drawn-out litigation, * * *. Of course, finality is not an end in itself if there be manifest unfairness to any party in interest. None has been demonstrated" (Petition App. p. 8A).

The Securities and Exchange Commission opposed the petitioner below on the issue here tendered and as respondent has been advised will similarly doubtless oppose petitioner before this Court and thereby support the order and judgment challenged by petitioner.

QUESTIONS PRESENTED FOR REVIEW

What was before the District Judge for determination was the approval of an amended plan of reorganization proposed by the Trustee of Inland Gas Corporation (Inland) and Kentucky Fuel Gas Corporation (Kentucky) and the Trustee of America Fuel & Power Co. (American) following appeals from an earlier order of the District Judge approving a prior amended plan of reorganization for the same debtors. These appeals resulted in a direction for mandate by the United States Circuit Court of Appeals for the Sixth Circuit reflected in its opinion in 187 Fed. 2d 813 (1951). The most important issues in the earlier plan appeals arose out of the controversy in respect to the status or classification of the claims of Columbia Gas System, Inc. (Columbia) in the distribution of the assets of these debtors.

By the previous opinions of the United States Court of Appeals for the Sixth Circuit reported, *American Fuel & Power Co.*, 122 F. 2d 223 (1941), *Columbia Gas & Electric Co.* v. *The U. S.*, 151 F. 2d 461 (1945), and 153 F. 2d 101 (1946)* the District Judge was finally directed after an affirmance of the latter's findings and conclusions of law, to subordinate the claims of Columbia to the public holders of Kentucky and American obligations secured by pledges of Inland stock in recognition of their creditor status; and further that Columbia claims against American and Kentucky will remain subordinated to the claims of all of their creditors (*In re Inland Gas Corp.*, 187 F. 2d 819-20, 1951).

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* Cert. Den. by this Court (329 U. S. 737).

We do not share the views of the petitioner Kern in respect to the questions he deems present for review as predicated upon his petition for this writ of certiorari (Kern's petition p. 2), but rather submit that the only question that is presented is as follows:

> **Did the District Court and the Court below, in affirming the District Judge, fairly and equitably direct the distribution of the value of assets resulting from subordination on the facts as found by those Courts in these proceedings by refusing to impair the 72.6% of Inland stock securing American's notes in the hands of holders guilty of no wrongdoing?**

The judgment of which review is sought is predicated upon the Court of Appeals for the Sixth Circuit opinion in *In Re Inland Gas Corporation,* 211 F. 2d 381, in which that Court, adhering to its prior opinions, with logic and clarity, indicated at page 384 that there was no ambiguity in its prior mandate (187 F. 2d 813) and stated at the same page that the subordination of the Columbia claims was compelled by injury done to both creditors and stockholders of the American system but manifestly in the order of their priority; and that such subordination of the Columbia claims to the stock of Inland was on the basis of a measuring device of such stock for the account of the public creditors to American and Kentucky.

Although the petitioner cites Section 65A of the Bankruptcy Act (Title 11 U. S. C. A. Section 105a) as involved on this issue, we, too, rely upon that section and make reference to Bankruptcy Act Section 57 (a), (e) and (h) (Title 11 U. S. C. A. Section 93 (a), (e) and (h)); and Bankruptcy Act Section 216 (Title 11 U. S. C. A. Section

616). (See appendix for language of sections relied upon by this respondent.)

These sections make provision for the filing and allowance of claims including those having priority or security; and for the payment of dividends upon such claims. Since American's notes are secured by 72.6% of Inland stock, normal bankruptcy rules require the direction that American's creditors have the right to look to their security for payment.

STATEMENT OF FACTS

The Courts below since 1941 have had before them the problem of the distribution of the assets of these debtors in reorganization where the largest holder of securities of Inland and Kentucky, to wit: Columbia, was judicially branded to be a malefactor by virtue of violations of the anti-trust laws of the United States pursuant to a plan or conspiracy in the acquisition of these securities and the intended and actual use of them forever to destroy the threat of competition of the debtors then engaged as utilities in the production and distribution of natural gas in the area or areas served by Columbia.

The debtor, Inland, was incorporated on March 31, 1927, for the purpose of engaging in the business of producing, transporting and selling natural gas to industrial consumers. The enterprise was entirely financed by the sale of its securities to the public, the proceeds from which, after the payment of large financing and promotional expenses, it used to acquire natural gas reserves in Eastern Kentucky and to construct a transmission line from its gas fields to Ashland, Kentucky. In 1927, it issued

and sold its 7% First Mortgage Bonds in the principal amount of $1,000,000 and an issue of 7% cumulative preferred stock with an aggregate par value of $200,000. In 1928, it issued and sold its 6½% First Mortgage Sinking Fund Bonds, maturing February 1, 1938, in the principal amount of $4,400,000 and its 7% Ten Year Debentures in the principal amount of $1,500,000. These securities were underwritten and sold to the public by a group of investment bankers. From the net proceeds derived from the 1928 financing, the corporation retired the securities issues in 1927. The entire issue of its common stock consisting of 341,775 shares was acquired by the promoters and underwriters as compensation for services. The underwriters also received for their services from 10 to 12 percent of the proceeds derived from the securities. The net returns to the corporation were further depleted by other promotional expenses. In 1930 it sold to American its 6% Gold Notes in the principal amount of $400,000 (Record, *Columbia* v. *U. S., et al.*, Vol. 1, pp. 590-592; 329 U. S. 737, Nos. 129-130-131).

The debtor, Kentucky, was incorporated on May 17, 1928, primarily to acquire certain natural gas producing property located in Eastern Kentucky, then owned by American Rolling Mill Company. The organization was entirely financed by the sale of securities to the public, consisting of 6½% First Mortgage Sinking Fund bonds maturing June 1, 1942, in the principal amount of $4,000,000 and 7% Sinking Fund Debentures maturing June 1, 1938, in the principal amount of $1,000,000. These securities were marketed by some of the same group of bankers who financed Inland and upon the same terms. The common stock of the company, apportioned among

the promoters and underwriters, consisted of 500,000 shares. Out of the net proceeds derived from the sale of these securities the corporation paid $3,000,000 to the American Rolling Mill Company for its gas acreage (Record, *Columbia* v. *U. S., et al.,* Vol. 1, pp. 590-592; 329 U. S. 737, Nos. 129-130-131).

The debtor, American, was organized in July 1928 substantially by the same group who promoted Inland and Kentucky for the purpose of taking over and holding the stock of these operating corporations and of others planned to be organized, in order to integrate and expand their operations through unified control and management. The stockholders of Inland and Kentucky exchanged their stock, share for share, for stock in American which became the holding company. As of July 1, 1929, more than a year after the public financing of Inland and Kentucky, it issued and sold to the public 7% Convertible Gold Notes in the principal amount of $2,000,000 maturing July 1, 1934.* American used the net proceeds derived from the sale of these notes to provide financial aid to Inland and Kentucky, and to acquire additional natural gas acreage and transmission lines (Record, *Columbia* v. *U. S., et al.,* Vol. 1, pp. 590-592; 329 U. S. 737, Nos. 129-130-131).

The events which led to the receivership on December 2, 1930 as found by the District Judge, with his conclusions, are set forth in his decision of September 3, 1943 (Record, *Columbia* v. *U. S., et al.,* Vol. 1, pp. 590-602; 329 U. S. 737, Nos. 129-130-131). These findings had the concurrent

* The respondent, The Green Committee, appears in opposition to the petition for a writ of certiorari on behalf of the holders of the American Gold Notes.

approval of the Court of Appeals for the Sixth Circuit in 151 F. 2d, *supra*, 153 F. 2d, *supra*, and 187 F. 2d, *supra*, are briefly as follows:

> From the beginning of their operations Inland and Kentucky were under the supervision and management of Hope Engineering Company (hereinafter called "Hope"), an organization with wide experience in building natural gas transmission lines and successfully promoting natural gas enterprises. It considered the industrial area in and around Detroit, Michigan, which was not then supplied with natural gas, an inviting field, and recommended to American that an effort be made to enter this field. Plans to that end were formulated. Hope succeeded in inducing American Utilities and General Corporation and Moody-Seagraves Company to join in the promotion of the project, as the result of which this group (hereinafter called the "Syndicate"), united their resources and combined their efforts in a plan to construct a natural gas transmission pipe line extending from the gas fields of Eastern Kentucky through the heart of the territory then occupied and served by the subsidiaries of Columbia to the city of Detroit for sale and distribution of natural gas to industrial enterprises along the way, as well as in the Detroit industrial area. The Syndicate constituted a combination of sufficient financial strength and business experience to foreshadow success of the proposed plans.
>
> The Syndicate acquired voting trust certificates representing 450,000 shares of American stock and $60,000 in principal amount of American notes, for all of which it paid $154,000. It also acquired from American 1,000,000 shares of its newly issued common stock for which it paid $500,000. To prevent default in certain maturing obligations of American,

Inland and Kentucky, Hope agreed to provide funds sufficient to meet their immediate sinking fund requirements.

During the time the plans of the Syndicate to take natural gas to Detroit were maturing, Columbia was also making plans to supply natural gas from its Kentucky and West Virginia fields to the same area.

The plans, which Columbia contemplated for the development of its business in the Detroit field and for the maintenance of its monopolistic position occupied by its subsidiaries, were not only seriously threatened by the plans of the Syndicate for the development of the American Fuel System, but also by the starting of the Panhandle Eastern pipe line and the announced intention of United Carbon Company to build a natural gas pipe line to the city of Cincinnati, Ohio. The threat of competition by United Carbon Company was averted by Columbia arranging for its subsidiary, Warfield Natural Gas Company, to buy all the gas controlled by United Carbon Company. It met the threat of competition from the Panhandle Eastern pipe line by using one of its subsidiaries, Columbia Oil and Gasoline Corporation, to purchase complete control of that project entailing an investment of more than $30,000,000.

Columbia had complete knowledge of the financial structure of the American Fuel System and learned that the indentures securing the bonds of Inland and Kentucky provided that after their failure to meet interest or sinking fund requirements, upon the request of the holders of 25 per cent in principal amount of the bonds, the indenture trustees should declare defaults to have occurred and institute foreclosure proceedings. In order to place itself in a

position to force foreclosure and sale of the American Fuel System properties and afford it an opportunity to purchase them at a foreclosure sale, Columbia, in January, 1930, began to purchase bonds of Inland and Kentucky Fuel by methods which concealed the fact that it was the purchaser. By the end of April, 1930, it had acquired in excess of 25 per cent in principal amount of the bonds of both. It continued its efforts to gain covertly a commanding position in the financial structure of the American Fuel System until it had acquired approximately 36 per cent and 42 per cent, respectively, of the Inland and Kentucky First Mortgage Bonds, as well as $267,000 in principal amount of Inland Debentures and $342,000 in principal amount of Kentucky Debentures.

On October 30, 1930, Columbia entered into a contract with the Syndicate (which was consummated on November 6, 1930), under the terms of which, for the consideration of $2,826,789.38, it purchased the Syndicate's entire holdings in the American Fuel System and all other corporations which had been organized by the Syndicate for the development of the Detroit project, which included 76 per cent of the outstanding common stock of American. The price paid by Columbia represented the total amount invested by the Syndicate and a clear profit of $350,000. Under the terms of the contract, Columbia guaranteed to employ Hope to perform natural gas engineering work on at least $20,000,000 of construction projects within a period of three years, for which it agreed to pay Hope a compensation of 4 per cent, an obligation which it later discharged by paying Hope $400,000, without any work being done by Hope for that sum. Also under the terms of the contract, the Syndicate delivered resignations of all officers and directors of American and its

subsidiaries and the other associated corporations, the stock control of which was acquired by Columbia. Columbia agreed to hold the members of the Syndicate harmless by reason of the obligation of Hope to provide funds to meet sinking fund requirements of Inland and Kentucky and in respect to any obligation imposed by gas sales contracts entered into with industrial customers in Detroit and elsewhere.

By the use of certain claims thus acquired, Columbia promptly precipitated receivership proceedings against Inland and Kentucky which resulted in having them placed in the hands of Columbia's nominee, W. E. Lockhart, as receiver. This resulted in immediate discontinuance of all efforts to promote the Detroit project, and in curtailment of further extension of the subsidiary competition between Columbia and the American Fuel System (Record, *Columbia* v. *U. S.*, Vol. 1, pp. 590-602; 329 U. S. 737, Nos. 129, 130, 131).

The petitioner, Kern, is a lawyer. He began buying the Kentucky securities on May 5, 1941 and continued his purchase of these securities through the years until January 10, 1952 by which time he had acquired $303,300 face value of the bonds. Though the District Judge had directed that all issues be presented at the hearings in 1948 and 1949 in advance of the preparation and submission of a plan of reorganization, he did not assert or present the issue upon which his appeal from the District Judge's order of approval of the Amended Plan of Reorganization is based until he filed his objections to the Plan of Reorganization dated July 1, 1952 (Record p. 173).

Kern had attended and had participated in various hearings since the early part of 1948. Indeed Kern, specu-

lating in these Kentucky bonds since 1941, and participating in purchases since that date but as well in attendance at various hearings since early 1948 was determined, one way or another, to enhance the value of the bonds he had thus purchased at depressed prices. Not alone does he raise an issue which, known to him, had already heretofore been raised and rejected at hearings in 1948 and 1949 (Record p. 189), but also did he assert a claim for $3,000,000 on behalf of Kentucky. This latter claim for $3,000,000 was rejected by the District Judge who in concurrent findings was affirmed on an appeal by Kern to the Court of Appeals below. The latter Court in its opinion on December 4, 1953 (208 F. 2d 13) reaffirmed its earlier concurrent findings that the so-called instrumentality rule relied upon by Kern as adversely affecting American did not apply. Kern has sought no review of the decision affirming the rejection of the $3,000,000 claim against Inland on behalf of Kentucky.

Attention should be called to the fact that all of the Inland First Mortgage and Second Mortgage and Debenture bonds, except for those owned by Columbia, have been discharged and fully paid with interest from July 1, 1930 during the course of the bankruptcy trusteeship. This discharge of debt liability aggregated in excess of $7,000,000.

ARGUMENT

We submit that the determination of the Court of Appeals for the Sixth Circuit in the allocation and distribution of the property value which would have been distributable to Columbia but for the latter's infraction of the Federal anti-trust laws not alone was fair and equit-

able, but also was required on the facts in these proceedings. To distribute that value in accordance with what the petitioner contends to be the normal bankruptcy rule in light of the unusual and abnormal factual conditions facing the District Judge and the Court below, would at once have been an unwarranted deprivation of the security representing the property rights of American and its innocent noteholders and would have resulted in an unfair, unreasonable and unjust enrichment of Kentucky's bondholders. Though we recognize that the investment these Kentucky bondholders made in 1928 proved to be highly speculative and improvident, yet good fortune resulting from the boom of World War II; from the subordination of the Columbia owned Inland First Mortgage and Debenture bonds; and from capable management by the Inland and Kentucky trustee has nevertheless smiled upon Kentucky bondholders, including Kern, since under the amended plan approved by the District Judge with the concurrence of the Court of Appeals for the Sixth Circuit leaves for the Kentucky bondholders $1,180,975.65 of common stock in the reorganized company out of a total of $5,454,469.88.

Had it not been for the funds realized from the public sale of the notes of American after July 1929, Kentucky's bonds having been sold in June 1928, Kentucky would unquestionably have suffered greater losses. The investment by the American noteholders in 1929 of approximately $1,800,000 realized on the sale of these notes, was to the extent of $962,500 used to relieve Kentucky from the contract it assumed in July and August 1928 for the acquisition of certain oil and gas leases and leaseholds in

Floyd and Knott Counties, Kentucky (Record pp. 192-197 inclusive).

The instant case is not one in which the parent company, American, organized the subsidiaries. We do not have here a case in which the parent was in any way responsible for the public financing of its subsidiaries, in this instance Inland and Kentucky; but rather do we have a situation where the parent was formed subsequent to the formation of the companies later to become the parent's subsidiaries. The credit of the parent and the funds of its American noteholders were subjected to the business risks and dangers theretofore undertaken by Inland and Kentucky.

These risks and dangers were in the main assumed with the public funds obtained by American on the sale of the notes whose collateral by way of Inland stock on deposit with the American Indenture Trustee Kern now seeks to impair contrary to all of the concurrent findings and conclusions of the Court below in its affirmances of the District Judge.

Kern made effort to persuade the Court below that the Kentucky estate, and therefore its creditors, are in such poor and sorry plight as to justify that Court acting not as a result of the facts and applicable legal or equitable principles, but rather as the result of sympathy—feigned equity.

The American creditors whose moneys were used to keep Inland and Kentucky afloat have been found innocent of any wrongs, imaginary or otherwise. Fortunate indeed is it that both American's creditors may look to Inland

to the extent of the Inland stock in each estate resulting from the subordination of the Columbia owned securities. Even so, nothing in the facts in any way mitigates in favor of the Kentucky estate or properly serves as justification for the destruction of the rights of the American public creditors.

What Kern seeks is to disregard the concurrent findings, conclusions and judgments solemnly arrived at in the following respects:

Kern seeks the disregard of all of the findings heretofore made and affirmed by the Court of Appeals that the separate corporate entities must be observed; that American was organized, in substantial part at least, to provide funds for Inland and Kentucky to meet their respective obligations; that there is no ground or basis for subordinating American's claims against or stock interests in Inland to the interests of Kentucky in Inland or to the claims of Kentucky's creditors; and that the indebtedness of each company must be the basis of a claim or of claims against the assets of that particular company (Record pp. 37-40).

He disregards the fact that American's creditors parted with their money in the late summer and fall of 1929 after all of the events of 1928 dealing with the flotation of the securities of Inland and Kentucky and contractual arrangements between Inland and Kentucky (Record p. 199).

Kern disregards the property rights of the American creditors in the Inland stock relied upon and held as their security since the notes were publicly issued in the late summer and fall of 1929. Instead, he asks in effect,

a holding that American's public creditors should not participate in Inland's assets measured by the stock which has been pledged for over 24 years, hoping thus to permit a substantially increased distribution to the Kentucky creditors of property which never was theirs or in which they never had an interest.

All of the facts upon which Kern now relies were a matter of public record and actually known by Kern in 1948 (and probably known by him since 1941 when he first bought in), including the contention that the Kentucky creditors should participate in Inland's assets with other creditors. This contention the District Court rejected to the knowledge of Kern in 1949 and no appeal was taken from that determination (Record pp. 89-190-191; 201).

Although the Court of Appeals, Sixth Circuit, affirmed the District Judge in his finding that American's creditors in no way visited inequity upon or did injury to the Kentucky estate or its creditors (Record pp. 39-40), the Kentucky creditor, Kern, seeks in effect to subordinate, if not totally destroy, the collateral of Inland stock pledged in July 1929 by American to secure the American notes.

Despite the findings and conclusions of the District Court concurred in by the Court below, with a history of nearly 24 years of proceedings during which the various committees for creditors and representatives of creditors were acquainted with the facts and participated in the proceedings, a factual situation has never been presented nor is now presented by Kern who seeks, wholly without justification, the reversal of the many findings made. Nothing is presented which justifies depriving the Amer-

ican estate and its creditors of the security which is theirs.

Finally, the Court of Appeals was asked to disregard its own opinions in 151 F. 2d 470, and 187 F. 2d 813, by which it is evident that American's function as a parent was more than fully and fairly discharged; that its creditors are innocent of wrongdoing, or of having done injury to the creditors of Kentucky or Inland; that American's creditors have the legal and equitable right to look to the assets of the estate which is its debtor including the Inland stock as an asset collateral to their claims.

Among the issues presented to the Court of Appeals earlier in the proceedings and resulting in its opinion reported in 151 F. 2d 470 at page 479 (1945) was one raised by this respondent. We then sought a ruling which would have vested in Inland's Trustee for the benefit of all creditors, including the then unpaid first Mortgage and Debenture bondholders, the value of the Columbia owned but subordinated Inland bonds. The District Judge before whom this issue was raised rejected such solution as did the Court of Appeals. This respondent sought, as the Court of Appeals' opinion reflects, what was tantamount to an impairment of the security available to the then Inland First Mortgage bondholders. The Court of Appeals in discussing this problem properly held as sacrosanct and unimpairable, absent intervening equities, the security of a creditor even where part of a secured debt is valid and part is invalid, for at page 480 the Court did say:

> "Nor does there seem to be any justifiable basis for application of the 'doctrine of substitution,' or subrogation, for the benefit of the general creditors

or debenture holders in the instant case. So far as the record shows, the bondholders who yet hold valid first mortgage bonds have done nothing to the detriment of the holders of junior liens, or of general creditors. See Martin v. Commercial Nat. Bank of Macon, Ga., 5 Cir. 228 F. 651, 654. Appellants are claiming the right to subrogation without any showing that they actually have sustained or will sustain loss from the rejection of Columbia's claim. The assets of the bankruptcy estate have been neither increased nor diminished by that rejection. The status quo of the assets of the debtor remains unchanged. It is true that the liabilities of the estate have been reduced, but not at the expense of general creditors.

"Where a part of a secured debt is valid and a part invalid, no good reason appears for permitting other creditors to share in the security. Indeed, the contrary has been held in cases where the equities of the mortgagees appeared weaker than do those of the holders of the valid Inland first mortgage bonds. * * *"

The Court below had in mind the payment during trusteeship of over $7,000,000 to Inland's mortgage and debenture bondholders when it made the following reference in its opinion in 211 F. 2d, *supra*, at page 383, that it gave:

"no consideration, therefore, to the appeals of Kern and the Vanston Committee in so far as they urge that the surplus assets of Inland be considered as those of a single economic entity to be allocated pari passu to creditors of American and Kentucky,"

for as the Court went on to say:

"This would ignore the separate identity of the two corporations and logically suggest a backtrack-

> ing to subject the total Inland assets to the same process. This no one advocates and in view of the payments already made of Inland's debts may not be accomplished."

The Court thereby did not intend to refuse to give its ear. Upon giving its ear to the Kern contentions, it felt unwilling to consider them as having substance or merit.

The nefarious activities of Columbia conducted between January 1930 and December 1930 were carried on pursuant to the conspiracy as found and adjudicated by the Courts below in the various opinions. The status of these innocent public security holders of the American system in relation to each other, vis-a-vis Inland, at the time of the alleged illegal activities of Columbia,* was as follows:

> 72.6% of Inland stock collateral to the outstanding $1,905,100 of American's notes, omitting those owned by Columbia;
>
> 26% of Inland stock owned but not pledged by Kentucky with outstanding unpaid First Mortgage and Debenture bonds, except for Columbia, aggregating $2,778,600 in principal amount of which $2,236,600 were First Mortgage Bonds and $542,000 Debenture Bonds;
>
> 1.4% publicly held but not in the hands of any creditor of any of the debtors which then constituted the American system.

Columbia, at the time the injuries suffered by and the damages visited upon the then creditors, difficult as it may

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* In view of the discharge of Inland's First Mortgage, Second Mortgage and Debenture bonds, no reference to them is here made. There remains unpaid a direct debt of Inland to American provided for satisfaction in the Plan by the issuance of stock.

have been and may be definitively to evaluate, owned First Mortgage Bonds, Debentures and a general claim which without interest aggregated over $2,100,000 and with interest to December 31, 1952 totalled $5,084,922.76 (Record p. 273).

The Court of Appeals in directing the distribution of the value of the Columbia claims against Inland in the fair and equitable proportion among the creditors of the debtors making up the American Fuel System thus destroyed by Columbia used the only measuring device available for such distribution.

To apply the so-called normal bankruptcy rule Kern urges would result in the improper and inequitable invasion of the security of the American notes flying in the face of concurrent fact findings by the Court below that American was guilty of no mismanagement, fraud, overreaching or inequitable conduct and none is urged by Kern to exist since none exists in this record.

The petitioner Kern seems to overlook the factual as well as legal and equitable significance presented by this record. In relying on Section 65A of the Bankruptcy (Title 11 U.S.C.A. Section 105A), which provides for dividends of an equal percentum on all allowed claims specifically excepts "such as have priority or are secured." There are other sections of the Bankruptcy Act which have similar significance in support of the order of which petitioner seeks review.

Sections 57 (a), (e) and (h), (Title 11 U.S.C.A., Sec. 93 (a), (e) and (h)) and 216 (Title 11 U.S.C.A. Sec. 616), respectively require a creditor to disclose what securities are held for his claim; the temporary allowance of claims

of secured creditors and those having priority to enable them to participate in the proceedings at creditors' meetings before the determination of their securities or priorities with recognition of the value of the security or priority, for the value of the securities to be determined and finally under Bankruptcy Section 216 procedures under the plan of reorganization are provided in respect to recognition of the claims of secured creditors and the distribution under such plan. The determination of the Court below therefore comes squarely within normal bankruptcy rules heeding as it must the fact that American's notes were secured by 72.6% of Inland stock and no justification exists for the impairment of that security.

Although at first glance references to the opinions of this Court in *Case et al* v. *Los Angeles Lumber Products Co., Ltd.,* 308 U. S. 106 and *Consolidated Rock Products Co.* v. *DuBois,* 312 U. S. 510 have no application, second thought will, we trust, demonstrate their significance here, the District Judge having been affirmed in concurrent findings by the opinion and judgment below to subordinate Columbia's claims against these debtors. Such subordination increased no assets. It simply made available to others in the order of their priority that portion of the assets which would otherwise have been distributed to Columbia. Having done this, the estate of American and the estate of Kentucky moved into the position of Columbia to participate. American's participation was represented and evidenced by 72.6% of Inland stock securing American's notes.

As Mr. Justice Douglas, speaking for the unanimous Court in both *Case* v. *Los Angeles Lumber Products Co. Ltd., supra,* and *Consolidated Rock Products Co.* v. *DuBois, supra,* indicated, in the former case that a creditor is

entitled to his full or absolute priority and in the latter opinion, at pages 528, 529 wrote:

> "The absolute priority rule does not mean that bondholders cannot be given inferior grades of securities, or even securities of the same grade as are received by junior interests. Requirements of feasibility of reorganization plans frequently necessitate it in the interests of simpler and more conservative capital structures. And standards of fairness permit it. This was recognized in *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co.*, 271 U. S. 445. This Court there said (p. 455) that though 'to the extent of their debts creditors are entitled to priority over stockholders against all the property' of the debtor company, 'it does not follow that in every reorganization the securities offered to general creditors must be superior in rank or grade to any which stockholders may obtain. It is not impossible to accord to the creditor his superior rights in other ways.' And the Court went on to say (p. 456), 'No offer is fair which does not recognize the prior rights of creditors * * *; but circumstances may justify an offer or different amounts of the same grade of securities to both creditors and stockholders.' Thus it is plain that while creditors may be given inferior grades of securities, their 'superior rights' must be recognized. Clearly, those prior rights are not recognized, in cases where stockholders are participating in the plan, if creditors are given only a face amount of inferior securities equal to the face amount of their claims. *They must receive, in addition, compensation for the senior rights which they are to surrender.* If they receive less than that full compensatory treatment, some of their property rights will be appropriated for the benefit of stockholders without compensation. That is not permissible. The

> plan then comes within judicial denunciation because it does not recognize the creditors' 'equitable right to be preferred to stockholders against the full value of all property belonging to the debtor corporation.' *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co.*, supra, p. 454." (Emphasis ours.)

What the Court of Appeals has done with the property value created as the result of the subordination of Columbia's claims acquired and used "in furtherance of an integrated scheme to destroy the American Fuel System" 151 F. 2d 461 at page 467 was to distribute (foreshadowed by the Court of Appeals' opinion in 122 F. 2d, *supra*, 1941) the value of the Columbia owned claims to those held by the innocent public. It did not intend, as Kern's petition attempts by confusion to have one believe, that American or Kentucky is a creditor either in the legal or normal bankruptcy sense in respect to the provability or allowability of a claim. It rather indicates that in the special factual circumstances of the case, as between American and Kentucky, separate corporate entities properly ought be recognized. It did so in the distribution of the value of the wrongdoer's subordinated claims.

As was stated by this Court on another issue in these proceedings, in *Vanston* v. *Green, et al.*, 329 U. S. 156, at page 163, the distribution of allowed claims in bankruptcy is effected under equitable principles.

In the Court of Appeals' opinion in another phase of these proceedings involving a claim for $3,000,000 alleged to exist by Kern on behalf of Kentucky against Inland, that Court in 208 F. 2d 13, at pages 14 and 15, had this to say:

> "Kern, a lawyer, began buying Kentucky securities on May 5, 1941. It became apparent from our

decision in In re American Fuel & Power Company, supra, on August 15, 1951, that the large claims of Columbia would either be subordinated to the claims of other creditors or be entirely rejected. Our subsequent decisions gave finality to this foreshadowing and also pointed to the highly successful operations of the single trustee. Kern continued his purchase of Kentucky securities through the years until by his last purchase on January 10, 1952 he had acquired $303,300 face value of the bonds. He had attended and been heard at various hearings since the early part of 1948. Though the court had directed that all claims be presented at the hearings in 1948 and 1949, he filed no claim on behalf of Kentucky until his petition in this case, on April 25, 1952. It was opposed in the court below by the Green Committee representing security holders of American Fuel who will be adversely affected if Kern prevails. The Securities & Exchange Commission recommended the plan heretofore approved by the court, and its brief here supports the challenged orders."

And again in 208 F. 2d 13, the Court of Appeals for the Sixth Circuit commented at page 17:

"• • • Finally, it must be observed that Kern's claim was never brought to the trustee's attention from 1941 to 1952, nor previously by his predecessors in the ownership of his bonds, although the precise facts upon which he bases his claim had been presented by the trustee to the court in a somewhat analogous controversy. • • • "

Having failed in his assertions of a $3,000,000 claim intended to bolster the assets of Kentucky whose bonds he accumulated over a period of 11 years from 1941 to 1952, Kern now seeks to accomplish an even better dollar result

by the assertion of an alleged bankruptcy rule as to asset distribution wholly inapplicable to the facts in the case at bar. He intends to add confusion to the delay in the termination of these proceedings, now nearly 24 years old. Kern, being a lawyer, speculating as he has in these Kentucky securities for over 11 years may properly be designated litigious.

These proceedings have run the gamut of the District Court and the Court of Appeals on many issues. Basically all that they involved were the application of principles as old as equity jurisprudence. In the proceedings involving the subordination of the Columbia claims the Court of Appeals in 151 F. 2d 461 at page 469 observed:

> "The prospect of recovery and possible profit in what may now seem to have been initially an improvident investment by security holders, lay in the achievement by American Fuel and its subsidiaries of an expanded market to be opened up by the Detroit pipe line. The realization of their hopes was forever destroyed by the activities of Columbia in assuming control of the American Fuel System, terminating further pursuit of the Detroit plan and placing the companies in receivership. * * * The hope that the debtors, their public creditors and the Syndicate may have had in the success of the Detroit project, was one they had a right to entertain. If realized, American Fuel would not have been the first company saved from disaster by improved management and access to an expanded market. It is idle, therefore, to contend that the elimination of that prospect was not an injury to them, however impossible it may now be to measure their damage. * * * "

The confusion in respect to the distribution of the value of the Columbia owned Inland securities arose, not out of the appropriate principle to be applied nor yet out of the use of an appropriate measuring device by which that value should be apportioned, but rather resulted from the increased value of the assets of Inland between the determinations in 1945 reflected in 151 F. 2d 470 (C. A. 6th) and in 1951 reflected in 187 F. 2d 813 (C. A. 6th). The clarity of the Court of Appeals and the consistency of its conclusions in respect to the apportionment of the value of the Columbia owned Inland claims cannot be gainsaid. It pursued the fair, proper and just result which did not permit of the invasion or impairment of the security of the American noteholders. It measured the interest of those American noteholders in the value of the Columbia owned Inland claims by the Inland stock thus securing the American notes.

In 187 F. 2d 813, at pages 816 and 817, Simons, *C.J.*, speaking for the unanimous Court, wrote:

> "Reading the direction for decree in the light of the discussion contained in the opinion, and as objectively as we may, it is apparent that what was being considered was the injury done to both creditors and stockholders of closely related corporations. As the full picture is now disclosed, it seems reasonably clear that if there was not complete integration of the companies composing the American Fuel System, there was, to say the least, a coordination of their operations and an interdependence of purpose and capital structure."
>
> "* * * The purpose of the issue was to rehabilitate Inland, to save it from debt default and to increase its holdings of gas acreage, and the inference is like-

wise inescapable that this must have been understood by the investors. Moreover, it now appears that through excellent management by its trustee Inland assets are sufficient to pay all of its debts exclusive of the claim of Columbia, so that the expectation of its rehabilitation was not wholly vain. Besides, the entire reorganization structure now planned rests upon the assets of Inland. So viewing it, we think that the public security holders whose investments were guaranteed and supported by a pledge of Inland stock are, in a very true sense, creditors or quasi-creditors of Inland, and that whatever the formal arrangement may have been a realistic view is that they are entitled to creditor status in the plan of reorganization. Certainly a court of equity, particularly in a bankruptcy reorganization, has the power and likewise the duty to look through form to substance. Since this creditor status may practically be recognized only through the medium of Inland stock owned by American and Kentucky without raising problems of distribution and priorities, the court is directed to amend the plan of reorganization to subordinate Columbia claims to the stock of Inland and assign the residue of Inland assets over its debts, exclusive of Columbia's claims, to the account of their public creditors according to the respective stock interests of 72.6% for American and 26% for Kentucky. Whether this means that we have subordinated securities to stock or have subordinated them to debts, measured by the respective pledges of stock, seems to us immaterial for the result will be the same. * * * "

So, too, did the same Court in rejecting the Kern contention in 211 F. 2d 381 at page 384 refuse to impair the security of the American notes consisting of its interest in

Inland measured by the stock pledged to American's notes. In the equity sense, these American notes assumed quite properly a quasi-creditor status since the injury done and the damage suffered as the result of the Columbia illegal activities in the violation of the anti-trust laws and the stifling forever of the competition of the American Fuel System impaired the value of the Inland stock collateral to the American Fuel notes. The bankruptcy court sitting as a court in equity could do no less. The decision of the Court of Appeals in 211 F. 2d, *supra,* of which review is here sought was based upon the salient reasoning, continuing the logic and clarity of its earlier opinions as applied to later facts appearing at page 384:

> "Read in the light of our discussion in the several opinions cited, we think there is no ambiguity in the mandate of In re Inland Gas Corporation, supra. As we said, 187 F. 2d at page 817: 'Since this creditor status may practically be recognized only through the medium of Inland stock owned by American and Kentucky * * *, the court is directed to amend the plan of reorganization to subordinate Columbia claims to the stock of Inland and assign the residue of Inland assets over its debts, exclusive of Columbia's claims, to the account of their public creditors according to the respective stock interests of 72.6% for American and 26% for Kentucky.' And on page 820 of 187 F. 2d, 'Columbia claims against American Fuel and Kentucky Fuel will remain subordinated to the claims of their other creditors.' It is plain that the respective holdings of Inland stock by the two corporations was used as a measuring device to apportion the several interests of public security holders of each in the surplus assets of Inland. Precise enough at the time, it became imprecise only by

> reason of the wholly unexpected increase in Inland's surplus. The over-all concept, however, is clear. Columbia claims were subordinated to the secured claims against both American and Kentucky. Insofar as the percentage assigned to American is not now needed for complete liquidation of American's secured obligations, it is now available to Kentucky bondholders. True, the subrogation of Columbia claims was compelled by the injury done to both creditors and stockholders, but manifestly in the order of their priority. * * * In that case, we subordinated Columbia claims to the claims of all other creditors of every class. In our later decision, 187 F. 2d 813, we subordinated Columbia claims to the stock of Inland only as a measuring device for the account of the public creditors of American and Kentucky. We did not subordinate Columbia stock to the remaining stock of American Fuel. We are not concerned with Columbia's claims either as creditor or stockholder, unless the debts of American and Kentucky are fully paid. We perceive no unfairness in assigning the overage of American's assets to Kentucky's security holders who are equitably beneficiaries of Columbia's subordination."

The petitioner, Kern, misconceives, however innocently or unintentionally, the Court of Appeals' decisions. The sea upon which the parties litigant entered was not uncharted. The facts in the proceedings are obviously different from the facts in any other known case. The principles to be applied to the facts are well known. The Court of Appeals in subordinating the Columbia owned securities did so upon the basis that the value of its securities should under no circumstances be made available to it until all of the other public creditors of the American Fuel System

are paid. The creditors of that System are the American noteholders thus secured by 72.6% of Inland stock and the Kentucky bondholders whose estate owned 26% of Inland stock which, however, was not pledged to secure those bonds. The Court below quite correctly rejected the argument of petitioner which if accepted would have resulted in the impairment of American noteholders' security for the benefit of the Kentucky estate where the findings in this record indicate no intervening equity to support such result.

Moore v. *Bay,* 284 U. S. 4 (1931), has no application whatever. With the quotation at page 13 of the Kern petition, no disagreement can exist that dividends of an equal percentum on all alleged claims except such as have priority or are secured. The American notes are secured. Surely vis-a-vis the Kentucky estate the holders of American's notes are entitled to look to their security before permitting the Kentucky creditors to have any share in the value of that security.

The case of *Prudence Realization Corp.* v. *Geist,* 316 U. S. 89 (1942) does not support the petition. That case specifically directs that a plan should not classify creditors arbitrarily without due regard to their economic status as defined in their respective claims; and the reference to the Court of Appeals' opinion in 122 F. 2d 503 at page 505 (1941) supports the contention of the American noteholders whose security cannot, was not, and should not be impaired because there is no intervening equity such as fraud, mismanagement or concealment.

The *Sampsell* v. *Imperial Paper Corporation* case reported in 313 U. S. 215 cited at page 12 of the Kern petition was one in which the creditor of a corporation which was

formed to receive a fraudulent transfer would not be permitted participation ahead of creditors of the transferror but was limited to *pari passu* participation in the transferror's assets because that creditor had some knowledge as to the frudulent character of the transaction before the Court.

Kern is sensitive to and sensible of the fact that the Court of Appeals in its directions for mandate of which review is here sought, rejected participation by the holders of 1.4% of Inland stock since they were not in any sense creditors of any of the debtors for at page 14 of his petition he indicates that those holders of the 1.4% of Inland stock were properly placed below the American and Kentucky securities because of the very definite equity that they are stockholders. Kern, however, is oblivious to the facts and conclusions which are irresistible that American's equity rests in its collateral and that there is no factual, legal or equitable justification for any invasion of such collateral for Kentucky's benefit; and to do so would be tantamount to imposing the penalty of subordination upon the American estate in general and its noteholders in particular without warrant.

Petitioner makes reference at pages 12 and 13 of his petition to an article by Prof. A. A. Berle entitled, "Theory of Enterprise entity" (47 Columbia Law Review 343, 354) and quotes therefrom in its relation to the determination by the Court of Appeals in the ranking and priority of claims once corporate entities are wholly or partially ignored for the "reasonable expectations of the creditors and security holders must be taken into account in such determination."

That Law Review article by Prof. Berle supports this respondent's position for in it the author indicates the applicability of his thesis to a situation in respect to the relationship of a parent and its subsidiaries where together they "cease to represent a separate enterprise and to have become as a business matter more or less indistinguishable parts of a larger enterprise." The record below and the opinions of the Court of Appeals prior thereto indicate clearly that there was at all times a separate and distinct existence of each company even though in respect to operations they were coordinated.

We do not believe much attention need be paid to the second reason assigned by the petitioner for the right to a certiorari writ.

The Court of Appeals carefully and seriously weighed all of the facts reflected in the findings and conclusions of the District Judge. It did not attach sufficient merit or significance to make this contention worthy of consideration. We find nothing in the opinion of this Court in *U. S.* v. *U. S. Smelting Co.*, 339 U. S. 186 (1950), to indicate an application of the principle there stated as here applicable. That case held that an earlier judgment of the District Court granting a temporary injunction did not have the effect of establishing the law of the case. The District Judge and the Court of Appeals below having on the record made disposition of the "surplus assets" and having heard petitioner in respect to everything he desired to submit rejected his contention.

Comstock v. *Group of Institutional Investors, et al.*, 335 U. S. 211, affords no comforting support to petitioner. Comstock in that case, very similar to Kern, the petitioner

in this, apparently with a general knowledge of the conduct he alleges to be a wrong towards the securities which he now holds, many years after the alleged misconduct had ended now seeks to invoke a doctrine which would victimize innocent holders of securities. At page 226 of the *Comstock* opinion in 335 U. S., *supra,* this Court stated:

> "We are confronted at the outset with petitioner's delay and conduct and its effect on the duty of this Court and that below to pass on the merits of his objections. Comstock, apparently with general knowledge of the conduct he alleges to be a wrong toward the securities which he now holds, bought them at about 10 cents on the dollar nearly seven years after the alleged misconduct had ended. Thus, it was not Comstock who was a victim of any wrongdoing but those in whose hands the securities depreciated to the low point at which Comstock bought. It is apparent that Comstock bought a grievance to exploit and to reap the advantage of its rectification. Those who realized the loss through sales to Comstock could, in no event, be indemnified in this proceeding. From every viewpoint, the delay in asserting these claims is unusual. The District Court found it also prejudicial due to the death of six named witnesses and participants, among others, whose testimony would be important. While it considered the objections barred by laches, it nonetheless adjudged their merits."

While all questions might still be open before a bankruptcy tribunal until the case before it is closed, unless the questions decided reflect unfairness or injustice, those decisions of necessity must be final. Indeed they should be final in proceedings now in their 24th year on the facts in this record.

We find and submit that there is nothing in the record below that justifies the granting of the writ of certiorari applied for by Kern. We urge its prompt denial on the facts as found in the opinions as expressed by the Court of Appeals for the Sixth Circuit in these proceedings.

CONCLUSION

Upon the grounds and for the reasons heretofore stated, we urge that the petition for the writ of certiorari to be issued to the Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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New York 17, N. Y.

July 30, 1954

APPENDIX

U.S.C.A.

Title 11 §105(a)

§105. DECLARATION AND PAYMENTS OF DIVIDENDS.

(a) Dividends of an equal percentum shall be declared and paid on all allowed claims, *except such as have priority or are secured.* (Emphasis ours.)

Title 11 §93(a), (e) and (h)

§93. PROOF AND ALLOWANCE OF CLAIMS.

(a) A proof of claim shall consist of a statement under oath, in writing and signed by a creditor, setting forth the claim; the consideration therefor; whether any and, if so, what securities are held therefor; and whether any and, if so, what payments have been made thereon; and that the claim is justly owing from the bankrupt to the creditor.

(e) Claims of secured creditors and those who have priority may be temporarily allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be thus temporarily allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

(h) The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by

such creditors and the trustee by agreement, arbitration, compromise or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. Such determination shall be under the supervision and control of the court.

Title 11 §616(1), (10) and (11)

§616. PROVISIONS OF PLAN.

A plan of reorganization under this chapter—

(1) shall include in respect to creditors generally or some class of them, secured or unsecured, and may include in respect to stockholders generally or same class of them, provisions altering or modifying their rights, either through the issuance of new securities of any character or otherwise;

(10) shall provide adequate means for the execution of the plan, which may include: the retention by the debtor of all or any part of its property; the sale or transfer of all or any part of its property to one or more other corporations theretofore organized or thereafter to be organized; the merger or consolidation of the debtor with one or more other corporations; the sale of all or any part of its property, either subject to or free from all lien, at not less than a fair upset price and the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein; the satisfaction or modification of liens; the cancelation or modification of indentures or of other similar instruments; the curing or waiver of defaults; the extension of maturity

date and changes in interest rates and other terms of outstanding securities; the amendment of the charter of the debtor; the issuance of securities of the debtor or such other corporations for cash, for property, in exchange for existing securities, in satisfaction of claims or stock or for other appropriate purposes;

(11) shall include provisions which are equitable, compatible with the interests of creditors and stockholders, and consistent with public policy, with respect to the manner of selection of the persons who are to be directors, officers, or voting trustees, if any, upon the consummation of the plan, and their respective successors.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 189

PAUL E. KERN, A HOLDER OF KENTUCKY FUEL GAS CORPORATION FIRST MORTGAGE BONDS, PETITIONER

v.

BEN WILLIAMSON, JR., AS TRUSTEE OF INLAND GAS CORPORATION, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The United States District Court for the Eastern District of Kentucky issued no opinion; its order appears in the Record at page 178. The opinion of the Court of Appeals (Pet. App. 1a-8a) is reported at 211 F. 2d 381.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 1954 (R. 399); rehearing was denied April 7, 1954. The petition for a writ of certiorari was filed on July 3, 1954. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Where three related corporations are in reorganization under Chapter X of the Bankruptcy Act, two of which own substantially all the stock of the third, and where in order to reach an equitable result it has been ordered that creditors of the two parent corporations be paid from the "surplus assets" of the third corporation, and that those assets be divided between the two groups of creditors in proportion to the parent companies' stock interests in the third, may those assets be so divided or must they be divided among all the creditors as a group without respect to the extent of the stock interests?

STATUTE INVOLVED

The only portion of the Bankruptcy Act which has any direct bearing on the issue here involved is that part of Section 174 (52 Stat. 891, 11 U.S.C. 574, set forth in full at page 3 of the Petition) which requires that before a plan be approved in a Chapter X reorganization it be found "fair and equitable".

STATEMENT

The judgment of the Court of Appeals for the

Sixth Circuit, affirming the approval by the reorganization court of an amended plan of reorganization for Inland Gas Corporation ("Inland"), Kentucky Fuel Gas Corporation ("Kentucky"), and American Fuel & Power Company ("American") under Chapter X of the Bankruptcy Act, culminates almost twenty-four years' proceedings for the reorganization of these companies. Inland's public creditors have already been paid in full [1] and, under the plan as approved, American's public creditors will be paid in full and Kentucky's public creditors will receive a substantial payment.

Inland was organized in 1927 and Kentucky in 1928, to produce, transport and sell natural gas to industrial consumers. Funds for their operation were obtained through the sale of their debt securities to the public, the promoters receiving substantially all of their common stock. Kentucky used part of the funds raised from the sale of its debt securities to acquire 26% of Inland's stock. American, organized subsequently in 1928, acquired control of both Inland and Kentucky through exchange of its stock for 72.6% of Inland's stock and for a larger percentage of Kentucky's stock.

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[1] In connection with the claim of Inland's 6½% 1st mortgage bonds, an aspect of this reorganization was before this Court. *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156. The public holders of these bonds ultimately received approximately $2,650,000 principal and $2,600,000 interest (R. 271, 352). Inland's public debenture holders have been paid approximately $3,850,000 principal and interest (R. 271, 352-355).

American and Kentucky still hold 72.6% and 26%, respectively, of Inland's stock. (R. 275, 279, 347-348, 379.)

The history of this system has been set forth in some detail in the Commission's Advisory Report on the present plan (R. 347-353) and on various occasions by the courts.[2] From the outset Inland and Kentucky sustained substantial operating losses. In 1930, Columbia Gas & Electric Corporation (since succeeded by Columbia Gas System, Inc.; both referred to herein as "Columbia") commenced the purchase of substantial amounts of debt securities of Inland and Kentucky with the intent of avoiding competition by forcing these companies into receivership. When, however, a syndicate which had acquired control of the American system agreed to advance funds to make payments as they became due on the outstanding debt securities, Columbia purchased from the syndicate the controlling interest in the system. In December, 1930, Columbia caused Inland and Kentucky to be placed in receivership. (R. 349-350.)

The receivership proceedings were succeeded in 1935 by proceedings under Section 77B of the Bankruptcy Act and proceedings thereunder were also instituted in 1935 as to American. All these proceedings were later conducted pursuant to Chapter X of the Bankruptcy Act. They have been pending in the same court since 1940 and the plan

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[2] See footnote 5, *infra*.

attacked by petitioner deals with the assets of and claims against the entire system. (R. 269, 351.)

Although the various companies were formed to be operated as an integrated system, and although Inland and Kentucky initially were under common control and subsequently had a common trustee, the lines of corporate demarcation between them have been kept clear and their intercompany dealings have been conducted in accordance with formal contracts (R. 348, 351).[3] Almost all of the physical assets of the system are owned by Inland. American has several minor subsidiaries, but its principal assets have been its holdings of Inland stock and substantial debt claims against Inland. (R. 269-279.) Kentucky's only asset has been its Inland stock ever since a distribution of cash received from Inland as a result of a 1939 court-approved sale to Inland of Kentucky's physical properties (R. 353). Hence, the recovery of all security holders of the system necessarily stems primarily from the properties and operations of Inland. During the long reorganization period these increased greatly in value by reason of additional sources and reserves of gas and additional markets for gas.[4]

Also of great importance to the system's public security holders was the determination by the court below in 1945, after extensive litigation, that Columbia's conduct required subordination of its

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[3] See e.g., *In re Inland Gas Corporation*, 208 F. 2d 13 (C.A. 6th).

[4] *In re Inland Gas Corporation*, 187 F. 2d 813, 815, 817; *ibid*, 211 F. 2d. 381, 382 (C.A. 6).

claims against the three companies "to the claims of all other creditors of every class."[5]

By reason of the increase in Inland's valuation in the late '40s it then became apparent for the first time that Inland's value would be more than enough to pay in full all of its creditors other than Columbia. The question arose as to who was entitled to the excess, the so-called "surplus assets" of Inland, and how it should be allocated. In approving a plan of reorganization in 1949, the district court construed the prior subordination mandate of the Court of Appeals to require the satisfaction of Columbia's creditor claims against Inland before anything could go up to the creditors of American and Kentucky by virtue of these companies' holdings of Inland stock. *In re Inland Gas Corporation,* 92 F. Supp. 810. On this point, the Court of Appeals reversed. It held that Inland's surplus assets should go not to Columbia but to the public creditors of American and Kentucky, as "quasi-creditors" of Inland, in the ratio of the respective holdings of Inland stock by American and Kentucky. It declined, however, contrary to

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[5] *Columbia Gas & Electric Corp.* v. *United States,* 151 F. 2d 461, at 470, modification of mandate denied, 153 F. 2d 101 (C.A. 6), certiorari denied, 329 U. S. 737. Other cases, not elsewhere referred to, involving litigation with Columbia, include *Williamson* v. *Columbia Gas & Electric Corp.,* 27 F. Supp. 198 (D. Del.), affirmed, 110 F. 2d 15 (C.A. 3), certiorari denied, 310 U. S. 639; *In re American Fuel & Power Co.,* 122 F. 2d 223 (C.A. 6); *Columbia Gas & Electric Corp.* v. *American Fuel & Power Co.,* 322 U. S. 379; *Williamson* v. *Columbia Gas & Electric Corp.,* 91 F. Supp. 874 (D. Del.), affirmed, 186 F. 2d 464 (C.A. 3), certiorari denied, 341 U. S. 921.

the position urged by the Commission, to afford any participation to the 1.4% of Inland stock not held by American and Kentucky. *In re Inland Gas Corp.*, 187 F. 2d 813 (1951).

Accordingly, the plan now approved provides initially for the allocation of 73.6% of Inland's surplus assets to American and 26.4% to Kentucky.[6] Since, however, that portion of Inland's surplus assets so allocable to American, added to American's other assets, is more than sufficient to pay the claims of American's creditors in full, the plan provides for the distribution of the overage to Kentucky's creditors. (R. 289-291.)[7] In contrast to the situation in 1945 when it was expected that the subordination of Columbia's claims against Inland would not result in full payment of Inland's own publicly held debentures, the increase in the valuation of Inland has made it possible not only to compensate fully all public creditors of Inland but also the public creditors of American, for claims totalling in excess of $4,900,000, and to award stock in the reorganized company at a par value of $1,086,498 to the aggregate claim of $5,117,154 of Kentucky bondholders, and $94,478 par value

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[6] As noted, American holds 72.6%, and Kentucky holds 26% of Inland stock. The ratio 72.6 to 26.0, expressed in terms of percentages of the whole, is 73.6% to 26.4%.

[7] Columbia, which holds subordinated debt securities of American, did not participate in the appeal from the order approving the plan. Objection was made in the court below on behalf of stockholders of American to the provision for payment over to the creditors of Kentucky, but no petition has been filed on their behalf in this Court.

of such stock to the aggregate claim of $1,337,610 of Kentucky's debenture holders. (R. 275, 279, 289, 299, 356.) [8]

Petitioner, a bondholder of Kentucky, took part in these proceedings as early as 1948, and knew then that the question of allocation of Inland's surplus assets was pending (R. 189-191). While he chose not to participate in the 1951 appeal, he now contends that the court below erred in adhering to its 1951 mandate that distribution of Inland's assets, after payment of its own creditors, should be measured by the respective holdings of Inland's stock by American and Kentucky. Petitioner contends, instead, that distribution should be made in accordance with the respective face amounts of the claims against the latter companies.

ARGUMENT

1. The substantive issue in this case can arise only under the very special circumstances which here prevailed. Only where a family of corporations have been so managed, or mismanaged, as to require the subordination of the claims of the top company to all creditor claims against the group, where creditors of the parents have been accorded rights against the assets of the subsidiary, and where there is more than one parent among whose creditors the assets are to be divided, can this par-

[8] The allocation as between Kentucky's bonds and debentures represents a compromise of a dispute concerning whether Inland's stock is subject to the lien of the mortgage covering Kentucky's bonds (R. 379).

ticular question of how the assets are to be divided arise. The petitioner himself states (Pet. 12): "Here the Court [below] entered an uncharted sea." Obviously the course selected by the court below is not of general importance and the issue does not require consideration by this Court.

2. The court below determined merely that the facts of this case do not justify disregard of the "separate identity" of American and Kentucky in the distribution of the assets of Inland. (Pet. App. 4a). Accordingly, it reaffirmed its 1951 determination that after the payment of Inland's creditors, other than Columbia, Inland's surplus assets should be distributed in accordance with the respective stock holdings in Inland of American and Kentucky to the public creditors of those corporations.

Since Inland's assets, however, are more than sufficient to pay the balance of the claims of American's creditors, other than Columbia's subordinated holdings, the court permitted the remainder of the 73.6% share allocable to American to be applied to the claims of Kentucky's creditors. Whether or not the court should have permitted this overage to go to Kentucky's creditors is not involved here, nor is there here involved the propriety of the court's 1951 determination to exclude the 1.4% of public stockholders of Inland (as distinguished from American and Kentucky) to share in the benefits resulting from Columbia's subordination. There is no question, however, that these

determinations of the court below clearly benefitted petitioner as a creditor of Kentucky.

In determining that the separate corporate interests of the system companies must be respected in distributing Inland's assets to American and Kentucky, the court below merely recognized that creditors in those two companies must claim through them to reach Inland's assets. Indeed, as this Court has emphasized, even where funds obtained from security holders of interrelated companies have been commingled, the allocation to claimants in a reorganization involving the related companies must be based on the value of the assets of the respective companies. *Consolidated Rock Products Co.* v. *DuBois,* 312 U.S. 510, 524. Petitioner complains of factual and legal error by the court below (Pet. 12) but it has not shown that intercompany transactions within the American system were unfair to Kentucky's creditors so as to justify obliteration of the lines demarking the investors' property rights.[9] Absent overreaching, we know of no instance where the mere fact of common control authorizes complete disregard of corporate entities and contractual arrangements.

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[9] See e.g. the transactions complained of by this petitioner which were considered in *In re Inland Gas Corp.*, 208 F. 2d 13 (C.A. 6). *Sampsell* v. *Imperial Paper Corporation,* 313 U. S. 215, cited in the petition (p. 12), merely stands for the proposition that where a corporate device is used to perpetrate a fraud a creditor who knew of the fraud may not take advantage of it to the detriment of the intended victims of the fraud.

The principle, emphasized by petitioner, that creditors must share alike has no application to creditors of different classes.[10] Nor can the creditors of Kentucky and American be considered in the same class merely because the court below, for the purpose of subordinating Columbia, designated them as "creditors or quasi-creditors of Inland." The fact that Columbia's conduct has been found to be so inequitable that subordination of its interests was required affords no basis for upsetting the rights *inter sese* of the other creditors of the system, who presumably bought and held their securities on the basis of financial information as to the particular company in which they invested.[11]

Despite implications to the contrary in the petition (Pet. 14), there has been no subordination of Kentucky's creditors to those of American. The surplus assets of Inland are paid to Kentucky's

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[10] The petition quotes (pp. 13-14) from *Geist* v. *Prudence Realization Corp.*, 122 F. 2d 503, 505 (C.A. 2), reversed, 316 U. S. 89, as to the appropriate bankruptcy law respecting equality of distribution, but neglects to quote from the preceding sentence of the opinion which makes clear "that a plan may not * * * classify creditors arbitrarily, without due regard to their economic status as defined in their respective claims."

[11] For example, it was stated in the offering circular for the American notes (R. 164-72):

> The Company and a subsidiary own 99% of the outstanding stock of the Inland Gas Corporation * * *.
>
> * * * * * *
>
> These Notes are direct obligations of the Company and are specifically secured by the pledge of all the capital stocks of subsidiary companies now owned.

creditors to the extent that Kentucky has a stock interest in Inland. In addition, Kentucky's creditors are permitted to receive the overflow after payment of American's public creditors. Allowance of this windfall to Kentucky's creditors cannot effect any change in their status vis-a-vis American's creditors. It does, however, serve to illustrate the error in the petitioner's apparent contention that the decision below does not recognize "that subordination and ignoring corporate entities are flexible, not rigid concepts." (Pet. 15)

3. The court below did not refuse to consider appellant's contention on the merits. Read in context, it appears that the court's statement quoted in the petition (Pet. 10), to the effect that it gave no consideration to the petitioner's appeal, meant merely that in view of its previous unchallenged determination of the issue involved it was not disposed to examine it as if it had never before been considered. The paragraph in which this statement occurs shows that the court did give consideration to petitioner's argument, since it summarized the reason for its disagreement therewith; indeed, the opinion as a whole shows that the court carefully considered all aspects of the fairness of the plan (Pet. App. 4a-5a). Since the court did not rely upon *res judicata,* law of the case, or laches, the petitioner's quotations from *United States* v. *U. S. Smelting Co.,* 339 U.S. 186,

and *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211 (Pet. 16-18) are inapposite.[12]

CONCLUSION

The judgment below is correct and presents no question warranting further review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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WILLIAM H. TIMBERS,
General Counsel,
DAVID FERBER,
Special Counsel,
HENRY L. STERN,
Attorney,
Securities and Exchange Commission.
AUGUST, 1945.

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[12] That the court below could not have felt itself bound by law of the case is clear from its opinion in *In re Inland Gas Corp.*, 187 F. 2d 813, 815-816 (Pet. App. 11a-12a), where Judge Simons, who also wrote the opinion below, expressly recognized the interlocutory character of determinations respecting allowance of claims in bankruptcy, stating that "no application of the principle of 'the law of the case' " would prevent the court from modifying a previous mandate in an exceptional case.

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